UNITED STATES OF AMERICA,
UNITED STATES COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.

PLEAS AND PROCEEDINGS had and done at a regular term of the United States Court of Appeals for the Fifth Circuit, begun on the first Monday in October, A.D., 1954, before the Honorable Joseph C. Hutcheson, Jr., Chief Judge, the Honorable Wayne G. Borah, Circuit Judge, and the Honorable Benjamin C. Dawkins, Sr., District Judge:

JACK C. VAUGHAN,
Appellant,

versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING,
Appellees

BE IT REMEMBERED, That heretofore, to-wit, on the 21st day of April, A.D., 1954, a transcript of the record in the above styled cause, pursuant to an appeal from the United States District Court for the Northern District of Mississippi, was filed in the office of the Clerk of the said United States Court of Appeals for the Fifth Circuit which said transcript was filed and docketed in said Court of Appeals as No. 14921; and that on the 3rd day of May, A.D., 1954, a supplemental transcript of the record in said cause was filed; and that on the 19th day of July, A.D., 1954, a portion of the transcript of record requested by appellee King was filed, which said transcript, supplemental transcript and portion of transcript are as follows, to-wit:-

---

TRANSCRIPT OF RECORD

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT.

No. 14,921

JACK C. VAUGHAN,
Appellant,

versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, AND J. W. KING

Appellees.

Appeal from the United States District Court for the Northern District of Mississippi.

ORIGINAL RECORD RECEIVED

U.S. Court of Appeals
FILED
Apr 21, 1954
Oakley F Dodd,
CLERK.

I N D E X

Page

Complaint and Exhibits attached thereto. (Filed: June 1, 1953). 1

Marshal's Return of Service of Writ (Filed: June 8, 1953). 29

Motion To Dismiss of First National Bank of Greenville. (Filed: July 18, 1953) 30

FINAL DECREE of Adams County Chancery Court, in the Cause - 'J. W. King vs. Jack C. Vaughan', No. 14,632, rendered June 15, 1953 - EXCEPTING and omitting pars. (3), (4), (5), (6), (7), and (8) thereof 32

Motion To Dismiss of J. W. King. (Filed: July 21, 1953) 35

Motion To Disregard Effect Of Unjust Decree. (Filed: July 27, 1953) 37

Statement Of The Case; Affidavit Of Plaintiff; And Motion For Summary Judgment, together with the following Exhibits thereto: (Filed: July 27, 1953) 40

EXHIBIT "A" - "Declaration Of Domicile" . . . 58

EXHIBIT "B" - Certificate of Clifford R. Field, County Registrar 59

EXHIBIT "C" - Affidavit of Kenneth R Glenn. . 60

EXHIBIT "D" - Statement of U.S. Treasury Department - Internal Revenue, New Orleans, Louisiana. 61

EXHIBIT "E" - Affidavit of James J. Scanlon . 62

EXHIBIT "F" - Affidavit of Joseph L. Dominick 63

EXHIBIT "H" - Opinion, Chancery Court of Chicot County, Arkansas, cause No. 7894, Vaughan vs. Branson . . . 64

ORDER of November 19, 1953, dismissing action as to the defendant, J. W. King. 81

Motion Of Plaintiff To Extend Time For Appeal (Filed: December 8, 1953). 82

Affidavit Of Plaintiff; And His Election To Stand Upon The Pleadings, Heretofore Filed; And Suffer Judgment Of Dismissal As To Defendant First National Bank of Greenville, Mississippi, In Order To File Appeal. (Filed: December 8, 1953). 83

Election To Stand Upon The Pleadings. 85

Plaintiff's motion for dismissal. 86

Notice Of Appeal (Filed: December 16th, 1953) . . . 87

Request For Certification And Transmittal Of Portion Of Record To The United States Circuit Court Of Appeals For The Fifth Circuit (Filed: December 23, 1953) 88

CLERK'S CERTIFICATE . . . . . --

CLERK'S CERTIFICATE . . . . . --

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

INDEX.

Page.

Motion of appellant for intermediate order granting stay of proceedings..... 142

ORDER denying motion of appellant, etc..... 144

Motion of appellee J. W. King to dismiss appeal..... 145

Motion of appellee First National Bank to dismiss..... 147

Motion of appellant to strike motion of J. W. King..... 151

Motion of appellant to strike motion of First National Bank of Greenville, Miss..... 155

Motion of appellant to strike transcript of record requested of the District Clerk by appellee, J. W. King, and filed herein..... 163

Newly Discovered matter in support, etc..... 168

Argument and submission..... 174

Opinion of the Court..... 175

Judgment..... 180

Petition for rehearing..... 181

Order denying rehearing..... 186

Clerk's Certificate..... 187

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF

MISSISSIPPI

F I L E D

This 1 day of June, 1953
Hubert D. Stephens, Jr, Clerk
By I. M. Ptak
Deputy Clerk

JACK C. VAUGHAN, Plaintiff.

vs.

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI,

J. W. KING, Defendants.

CIVIL

NO. 120

C O M P L A I N T

1.

The grounds upon which the jurisdiction of the court depends is diversity of citizenship. The Plaintiff is a citizen of the State of Louisiana, and resides in Orleans Parish in said State.

2.

At all times hereinafter mentioned the Defendant, First National Bank of Greenville, Mississippi, was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Mississippi, and a citizen and inhabitant of the State of Mississippi, having its principal office and place of business in the City of Greenville, County of Washington, State of Mississippi.

3.

At all times hereinafter mentioned, the defendant J. W. King was, and now is, a citizen and inhabitant of the State of Mississippi, residing in the City of Greenville, County of Washington, State of Mississippi.

4.

The matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars.

5.

Plaintiff shows that on March 28,1950, he became equitable owner in possession of some 3,720 acres of farm and pasture lands, known as "Florence" Plantation, in Chicot County, Arkansas. That he paid some $15,000.00 in order to qualify for ownership of the said "Florence" Plantation. That upon the payment of the stated sum of $28,000-.00 cash, plus 1/5 of the 1950 "Florence" crop, plus assumption of a $24,000.00 First Mortgage on the property on or before December 1, 1950; plaintiff Vaughan would receive a warranty deed to the entire plantation from the then owner, Fred P. Branson. (See copy of Vaughan-Branson contract, marked Exhibit "A", attached hereto and made a part hereof, the same as though copied in full, herein). Pages 7-9.

6.

Plaintiff shows that due to his efforts in getting

an all-weather road into the "Florence" Plantation, at great personal expense and loss of time to himself; the value of the lands were greatly increased.

7.

Plaintiff shows that upon the urging and advice of the President, Wade W. Hollowell, of the defendant First National Bank of Greenville, Mississippi, acting on behalf of the said Bank, and within the scope of his authority; the plaintiff was induced to sell his interest in the "Florence" Plantation, reserving certain oil mineral rights, for $75,000.00 -- consisting of $51,000.00 cash, and the purchaser assuming the $24,000.00 First Mortgage. (See copy of letter: Jack C. Vaughan to J. W. King, dated September 18, 1950, Marked Exhibit "B", attached hereto and made a part hereof, the same as though copied in full herein. Page 10

8.

Plaintiff shows that he arranged for all funds necessary to effect a proper tender of the requisite funds to the said Fred P. Branson and obtain, therefor, a deed to "Florence" Plantation; but that plaintiff was compelled to rely upon commercial banking facilities and the knowledge peculiar only to supposedly experienced bankers to effectuate a legal and proper transfer of the funds to Branson in compliance with the terms of

the Vaughan-Branson contract of March 28, 1950. (See copies of the letters, Hollowell to Branson, dated October 30, 1950, and November 27, 1950, marked Exhibits "C-1" and "C-2" respectively, attached hereto and made a part hereof, the same as though copied in full, herein). Pages 11, 12.

9.

Plaintiff shows that the defendant, First National Bank of Greenville, Mississippi, became plaintiff's agent to complete the said transaction. (See copy of testimony in the case of Vaughan vs. Branson, No. 7894, in the Chancery Court of Chicot County, Arkansas, April 11, 1951, pages 86-87, inclusive, being the cross-examination of Mr. Wade W. Hollowell, President of the defendant, First National Bank of Greenville, marked Exhibit "D", attached hereto and made a part hereof, the same as though copied in full, herein). Pages 13, 14.

10.

Plaintiff shows that upon the advice and urging of the defendant First National Bank of Greenville, who was to be paid a joint fee or commission of $6,250.00 to be divided with the defendant, J. W. King, real estate agent, and agent of plaintiff; plaintiff retained a Lake Village, Arkansas, lawyer -- one, Carneal Warfield --- and at his request paid him a retainer of $500.00. Unknown to plain-

tiff, but known to the defendants First National Bank of Greenville and J. W. King; the said Lake Village, Arkansas, lawyer, Carneal Warfield, was either already, or subsequently became the attorney of the adverse party, C. A. Mewis, and antagonistic to the interests of plaintiff. (See copies of three evidences of payment of the said retainer to the said Carneal Warfield, marked Exhibits "E-1", "E-2", and "E-3") page 15 (See also plaintiff's Exhibit "F", which shows the said attorney, Carneal Warfield, appearing as attorney of record for the said C. C. Mewis against the plaintiff, Jack C. Vaughan, and which is attached hereto and made a part hereof, the same as though copied in full herein). page 16

11.

Plaintiff further shows that on the advice and urging of his agent, First National Bank of Greenville, and his agent, J. W. King, one, Mr. Kraemer (who later divulged that he was a partner of the purported prospective purchaser, C. A. Mewis, in the cattle business) was placed in possession of "Florence" Plantation with the understanding that all of the interests of the plaintiff would be carefully protected. (See copy of letter, J. W. King to Jack C. Vaughan, dated October 21, 1950, marked Exhibit "G", and made a part hereof the same as if copied in full, herein) page 17.

Plaintiff shows that known to his agents, d First National Bank of Greenville and J. W. King known to plaintiff Jack C. Vaughan; the said C. and certain Keith Brothers then conspired against plaintiff, and all the best farming lands of "Florence" Plantation were fraudulently and secretly leased by the said Mewis to the Keith Brothers for the years 1951 and 1952; which, coincidently, was for the same term of years as plaintiff's under the Vaughan-Branson contract of March 28, 1950. By this act, plaintiff was fraudulently deprived of use and occupation of "Florence" Plantation for the years 1951 and 1952. The Keith Brothers produced a cotton crop valued in excess of $50,000.00 during 1951 alone; and Mewis, besides producing corn believed to be of the value of $10,000.00, grazed more than one thousand head of cattle on "Florence" Plantation at a profit believed to be $30.00 per head in 1951 alone. As for plaintiff, Vaughan; he received not one cent of rental, nor one cent of the $75,000.00 for his interest -- by which bait he was lured from possession of "Florence" Plantation in the first place. (See excerpts from Order filed October 30, 1951, marked Exhibit "H", attached hereto and made a part hereof, the same as copied in full, herein). page 18.

13.

Plaintiff shows that the Opinion of the Court in the above mentioned suit for specific performance, Vaughan v. Branson, No. 7894, in the Chicot County, Arkansas, Chancery Court, was rendered on August 22, 1951. In its Opinion, the said Court held, in effect, that due to the negligence of the defendant First National Bank of Greenville, Mississippi, in the manner in which the said funds provided it were handled by the defendant Bank; the plaintiff, Vaughan, had failed to make a proper tender to the said Fred P. Branson prior to December 1, 1950, and Vaughan, therefore, was denied legal title to "Florence" Plantation. (See excerpts of said Opinion, marked Exhibit "J", and made a part hereof, the same as if copied in full herein) pages 19, 20.

14.

Plaintiff shows that having been deprived of use and occupancy of the said "Florence" Plantation during the years 1951 and 1952 by the fraudulent and negligent acts of defendants First National Bank of Greenville, J. W. King, C. A. Mewis, Carneal Warfield and the Keith Brothers; plaintiff Vaughan's farming equipment, of an estimated new replacement value of more than $20,000.00, stood idle for the years 1951 and 1952, and was eventually seized by the mortgagee, City Bank & Trust Company, Natchez, Mississippi.

By reason of the foregoing wrongs of defendants First National Bank of Greenville and J. W. King, the plaintiff sustained the following losses and damages, to-wit:

(a)	Vaughan's selling price to King-Lewis		$75,000.00
	LESS: Vaughan's cost from Branson		
	Cash	$28,000.00	
	1/5 of 1950 Crop	1,457.45	
	Mtg. Debt Assumed	24,000.00	53,457.45
	Net cash loss to Vaughan		$21,542.55
(b)	Loss of 2200 acres of oil mineral rights at $10.00 per acre		22,000.00
(c)	Loss of Use of "Florence" Pltn. - 1951 Crops	$60,000.00	
	LESS: Cost of Growing	30,000.00	30,000.00
(d)	Loss of Use of "Florence" Pltn. - 1952 Crops	$60,000.00	
	LESS: Cost of Growing	30,000.00	30,000.00
(e)	Value of Grazing 1951: 1000 head @ $30.00		30,000.00
(f)	Value of Grazing 1952 1000 head @ $30.00		30,000.00
(g)	Loss of Machinery & Equip. Seized		20,000.00
	Total Losses & Damages Sustained		$183,542.55

WHEREFORE, premises considered, plaintiff Jack C. Vaughan prays for judgment jointly, severally, and in the alternative against the defendants First National Bank of Greenville, Mississippi, and J. W. King, in the sum of One Hundred and Eighty Three Thousands and Five Hundred and Forty-Two and 55/100 Dollars ($183,542.55), together with his costs. And plaintiff prays for such other relief as is by this Court deemed necessary.

/s/ JACK C. VAUGHAN

Jack C. Vaughan PLAINTIFF
4440 Chef Menteur Hwy
New Orleans, Louisiana
MAILING ADDRESS:
P. O. Box 7082
MEMPHIS 18, TENNESSEE

STATE OF TENNESSEE }
COUNTY OF SHELBY } ss

Before me the undersigned authority in and for the State and County aforesaid, came and appeared Jack C. Vaughan who having first been duly sworn did state on oath that he is the Plaintiff in the above styled and numbered cause, and that the allegations contained therein are true, except as to those matters stated on information and belief, and as to these he verily believes them to be true.

/s/ JACK C. VAUGHAN
Jack C. Vaughan PLAINTIFF

SWORN TO AND SUBSCRIBED before me this the 30th day of May, A. D., 1953.

(S E A L) /s/ H. E. PARKER
Notary Public

MY COMMISSION EXPIRES:
My Commission Expires April 4, 1954

DEMAND FOR JURY TRIAL

The Plaintiff demands a jury trial of all issues triable to a jury herein.

/s/ JACK C. VAUGHAN
Jack C. Vaughan PLAINTIFF.

EXHIBIT "A"

March 28, 1950

Mr. Jack Vaughan
"Arlington"
Natchez, Mississippi

Dear Sir:

Confirming our oral conversation on this date I submit this letter contract for your consideration and acceptance or rejection touching the Florence Plantation in the southeastern portion of Chicot County, Arkansas, which plantation is more particularly described in a deed recorded in Vol. S-5, Page 165 of the Deed Records of Chicot County, Arkansas (as to the land together with other land) the lessor, Fred P. Branson, hereby leases for agricultural and graising purposes the said farm to Jack C. Vaughan on the following terms and conditions to-wit:

Lessee agrees to plant cotton, the cotton quota of 264 acres, more or less, to corn 200 acres; soy beans and such other crops in the amount of acres as lessee elects.

The crop as gathered and marketed lessor shall receive 1/5 of the crop without cost of growing, gathering and marketing to lessor. Lessor shall receive no rental for the pasture land.

Lessee shall keep the buildings and other improvements in good and usable repair at his cost.

Lessor shall have the right to sell any merchantable timber and the buyer thereof, if any, shall have the right of ingress and egress to remove the same but shall not interfer with or damage growing crops.

If and when during the term of this lease, the lessee shall pay as rent or otherwise $30,000.00 to the lessor or his representatives, the lessee shall receive a conveyance of an undivided one half of the said land owned by the lessor but when said conveyance is made the grantee shall assume one half of the mortgage still due the Connecticut General Life Insurance Company not exceeding $10,000.00 and the lessor shall make no further mortgage indebtedness or lien on said land pending the consummation of this agreement.

It is specifically understood that the agreement to make such conveyance in the amount of $30,000.00 is arrived at by giving lessee such deduction of the amount heretofore received by lessor on his purchase price of $78,000.00 paid and assumed on the fifth day of March, 1947.

(Any deed made hereunder to be subject to the particular reservation in deed from W. S. Rode to Fred P. Branson respecting royalty interests.)

Lessor also leases to lessee herein the grasing and pasture rights reserved in a deed to Anderson-Tully Company on 1520 acres conveyed to it, such reservation is contained in a deed recorded in Book X-5, Page 229 in the deed records of Chicot County, Arkansas.

If, in event lessee herein elects, to exercise the option to purchase the said plantation in its entirety on or before December 1, 1950, then and in that event he shall have the right to purchase the entire farm and receive a warranty deed therefor by paying the lessor the crop rent for 1950 and $28,000.00, and lessee assuming the remainder ($24,000.00) due the Connecticut General Life Insurance Company.

It is agreed between the lessor and lessee that this contract shall remain in effect for one year, if and in the event lessee exercises the option contained in the last paragraph herein above, but if he does not exercise the said option as of December,1, 1950, then this contract of lease and option to buy one half interest in the farm as hereinabove set out shall be for the years 1950, 1951, and 1952, expiring December 31, 1952.

Lessor hereby agrees with lessee that if necessary or convenient for his operation of the said plantation in obtaining cost of operation he will execute a waiver of landlords lien for rental for the year 1950.

Any deed or conveyance in whole or part made to lessee under this contract shall embrace no land on the river side of the present levee but only the land side of the levee on the said Florence Plantation but shall include the pasture rights reserved in the said deed to Anderson-Tully on the 1520 acres on the river side of the levee.

The lessor has executed this letter and if the lessee accepts the same he will sign on the line opposite the lessor's signature.

Very truly yours,

s/ FRED P. BRANSON

Fred P. Branson

ACCEPTED:

s/ JACK C. VAUGHAN

Jack C. Vaughan

STATE OF MISSISSIPPI

COUNTY OF WASHINGTON

Personally appeared before me, the undersigned Notary Public, in and for said county and state, the within named Fred P. Branson and Jack C. Vaughan who acknowledged that they signed and delivered the foregoing instrument on the day and year therein mentioned.

Given under my hand and official seal, this 28th day of March, 1950. My Commission expires Jan. 20, 1954.

(S E A L)

s/ BESSIE MAE RIGNEY

Notary Public

Filed for Record 29th day of March, 1950 at 2:45 p.m. S/ R. W. PARRISH, Clerk. By s/ CLARA HENRY D.C.

CLERK'S CERTIFICATE OF TRANSCRIPT

THE STATE OF ARKANSAS)
)
County of Chicot) I, R. W. Parrish, Clerk of the Circuit Court and Ex-Officio Recorder, within and for the County and State aforesaid, do hereby certify that the annexed and foregoing pages contain a true and complete transcript of the Letter Contract wherein Fred P. Branson was Lessor and Jack C. Vaughan was Lessee as therein set forth, and as the same appears of record, on Page 1 Deed Record, Volume Q-6, Chicot County, Arkansas.

WITNESS my hand and official seal, this 15th day of December, 1950.

R. W. PARRISH, Clerk

(S E A L) By: s/ CLARA HENRY, D.C.

EXHIBIT "A"

- - - - - -

E X H I B I T " B "

T H E F I R S T N A T I O N A L B A N K

GREENVILLE, MISSISSIPPI

September 18, 1950

Mr. J. W. King,
Greenville, Mississippi

Dear Mr. King:

I herein agree to sell my interest in lands known as Florence Plantation, consisting of 2200 acres more or less in Chicot County, Arkansas, including one-half (1/2) of the Royalties, reserving unto myself the 7/8 oil and gas leases for a period of three (3) years, with the understanding if oil is discovered on said land within the period of three (3) years, then in the event said leases become productive the same shall be vested in me so long as oil is produced on said land. I also agree to assign my perpetual grazing rights on the levee thru the place, together with 1520 acres more or less adjoining said tract between levee and Mississippi River.

I herein sell the aforesaid for $75,000.00 consisting of $51,000.00 cash or equivalent and the assumption of a $24,000.00 note to the Connecticut General Life Insurance Company.

Very truly yours,

s/ JACK C. VAUGHAN

Jack C. Vaughan
Arlington
Natchez, Mississippi

s/ W. W. Hollowell

EXHIBIT "B"

- - - - - - - - - - -

EXHIBIT " C-1 "

THE FIRST NATIONAL BANK

GREENVILLE, MISSISSIPPI

October 30, 1950

AIR MAIL, SPECIAL DELIVERY

Judge Fred P. Branson

Muskogee, Oklahoma

Dear Judge Branson:

Following our conversation today I should like to outline in brief form the matter which was mentioned.

Mr. Jack C. Vaughan has presented a letter from Laub, Adams, Forman & Truly, attorneys of Natchez, Mississippi, to the effect that Mr. Vaughan is prepared to place $28,000.00 in the City Bank & Trust Company of Natchez to whom your deed covering Florence Plantation in Chicot County, Arkansas, might be sent with draft attached for such amount less the amount owed to Connecticut General Life Insurance Company for interest due on the note there.

There is also in this bank the amount of $10,400.00 which upon Mr. Vaughan's receipt of said warranty deed may be placed in escrow in this bank or in a bank of your selection or certified to the appropriate court in Arkansas pending disposition of your litigation concerning liability for rental.

Mr. Vaughan has asked me to write this letter because of the fact some of the funds are in this bank in escrow as

a means of exercising his option to purchase said Florence Plantation dated March 28, 1950.

Judge, as I see it regardless of the out come of your litigation the maximum amount claimed is covered with the $10,400.00 and it would seem appropriate, therefore, for you to remit your deed with draft attached on Mr. Vaughan at the City Bank & Trust Company, Natchez, Mississippi.

If we can be of any service to you in the matter please do not hesitate to call on us.

Awaiting your pleasure.

Very truly yours,

s/ W. W. HOLLOWELL

W. W. Hollowell
President

WWH: wr
cc: Mr. J. C. Vaughan
Natchez, Miss.
Blind Copy Mr. Carneal Warfield

* * * * *

EXHIBIT " C-2 "

THE FIRST NATIONAL BANK

GREENVILLE, MISSISSIPPI

November 27, 1950

Judge Fred P. Branson

Muskogee, Oklahoma

Dear Judge Branson:

I enclose herewith special warranty deed for the purpose of procurring conveyance of Florence Plantation in Chicot County, Arkansas to Jack C. Vaughan pursuant to terms of your contract with Vaughan dated March 28, 1950.

Mr. Vaughan's crop, having suffered from rain was very late in opening and the cotton is extremely thin. It has therefore been impossible to take pickers out of better cotton in the area and gather this crop up to this date.

In view of this fact Mr. Vaughan has caused four experts to carefully appraise the crop now in the field for the purpose of determining the amount of rental due you on said contract.

Mr. Vaughan believes that it is doubtful that this crop can ever be fully gathered.

As you know, you have waived your rental in favor of the Farmers Home Administration who financed the making of the crop which loan is in an amount far in excess of the gross proceeds expected from the crop.

Using the appraisal of the four individuals it was determined that the total amount of cotton to be expected is 13,500 pounds of which your one fifth share would amount to 2700 pounds. Using the New Orleans close today for December cotton at 43.35¢ this amounts to a total of $1170.45 computing approximately 1/3 ton per bale your seed for 5.4

bales @ $30.00 would amount to $162.00. Quaker Oats is currently paying $1.25 per bushel for corn on the shell and your one fifth of the corn would amount to $125.00, making a total of $1457.45.

As you know there still remains the item of right away damage from Trunk Line Gas Company to be adjusted.

We enclose the appraisal mentioned above, special warranty deed and draft in the amount of $29,457.45. After you have signed the draft and have signed and properly notarized the deed you may deposit the deed with the draft attached at your local bank for collection. Funds are presently in this bank to honor such draft upon receipt of properly executed deed.

Very truly yours,

s/ W. W. HOLLOWELL

W. W. Hollowell
President

WWH: wr
Enclosures

AIR MAIL
SPECIAL DELIVERY

* * * * *

E X H I B I T " D "

The witness, Mr. W. W. Hollowell, is Cross-Examined by Mr. Burnside, attorney for the defendant.

CROSS EXAMINATION

BY MR. BURNSIDE:

Q. Mr. Hollowell, you stated but I didn't quite catch it, do I understand that you were acting as agent for Mr. Vaughan in writing that letter?(NOTE: Letter of 11/27/50).

A. Yes Sir.

Q. What was your object in inclosing that deed with that draft - what did you intend to have done? What did you intend to have Judge Branson do?

A Execute the deed and sign the draft which would be paid by our bank on presenting.

Q And in that you were representing Mr. Vaughan as your agent?

A Yes Sir.

Q As I understand it, the object of that was Mr. Vaughan's exercise of his option under that original March agreement, was that it?

A Yes Sir.

Q The object was to exercise his option under the agreement

made in March, 1950, is that right? What were you trying to do in sending the thing?

A Trying to help Mr. Vaughan complete exercising the option which he started to exercise or tried to exercise sometime earlier.

Q Your thought then and your motive in sending that to Judge Branson was to exercise in behalf of Vaughan his

option to buy under that original contract, is that right?

A We weren't trying to exercise it, we were trying to have it exercised on behalf of Mr. Vaughan.

Q As his agent?

A That is correct.

That is all.

Witness leaves the stand.

JUDGE BRADHAM: All right we are through with you now, Mr. Hollowell and you may return to Greenville if you wish.

MR. HOLLOWELL: Thank you, Judge.

JUDGE BRADHAM: All right, put Mr. Vaughan back on the stand.

* * * * *

E X H I B I T " E-1 "

THE FIRST NATIONAL BANK OF GREENVILLE 85-54 842

Retainer - $500.00
This Check 100.00 Greenville, Miss., 3rd November, 1950
$400.00 Bal Due

F.N.B.

Pay To The Order Of CARNEAL WARFIELD $100.00

ONE HUNDRED AND NO/100 DOLLARS

Value Received And Charge To Account Of With Exchange

TO City Bank & Trust Co s/ JACK C. VAUGHAN
Natchez, Mississippi Acct. Jack C. & Anne G. Vaughan

On the back of the above Exhibit "E-1" appears the endorsement: "Carneal Warfield". Usual bank stamps, and perforated "Paid 11.15.50; 85-46"

* * * * *

E X H I B I T " E-2 "

CITY BANK & TRUST COMPANY
Natchez, Miss. 7th November, 1950

Pay To The Order Of JUDGE CARNEAL WARFIELD $200.00

TWO HUNDRED & NO/100 DOLLARS

Retainer in Branson Case $500.00
By Prev. Ck. $100.00
Amt This " 200.00 300.00
Bal. Due $200.00 s/ JACK C. VAUGHAN
Acct. Jack C. & Anne C. Vaughan

On the back of the above Exhibit "E-2" appears the endorsement: "Judge Carneal Warfield". Usual bank stamps, and perforated "Paid 11-18-50. 85-46

* * * * *

EXHIBIT " E-3 "

CUSTOMER'S DRAFT

24th November 1950

PAY TO THE ORDER OF JUDGE CARNEAL WARFIELD $200.00

TWO HUNDRED AND NO/100 DOLLARS
With Exchange

For: Bal. due on $500.00 retainer
in Branson v. Vaughan case

TO: Union National Bank, s/ JACK C. VAUGHAN
Little Rock, Arkansas Acct. Jack C. Vaughan

On the back of the above Exhibit "E-3" appears the endorsement: "Judge Carneal Warfield". Usual bank stamps, and perforated "Paid 11-28-50. 81-11".

* * * * *

EXHIBIT " F "

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

In the Matter of)
)
JACK C. VAUGHAN,) NO. 5070.
)
Debtor.)

- - -

COURT REPORTER'S TRANSCRIPT OF
TESTIMONY TAKEN BEFORE THE
REFEREE.

- - -

APPEARANCES:

HON. W. TILLAR ADAMSON, Pyramid Building, Little Rock, Arkansas, Attorney for Debtor.

MESSRS. BARBER, HENRY & THURMAN, Donaghey Building, Little Rock, Arkansas, and HON. OHMER C. BURNSIDE, Lake Village, Arkansas, Attorneys for Fred P. Branson, by HON. A. L. BARBER and HON. OHMER C. BURNSIDE.

MESSRS. ARMISTEAD, RECTOR & ARMISTEAD, Pyramid Building, Little Rock, Arkansas, Attorneys for J. W. King, by HON. W. H. RECTOR.

HON. CARNEAL WARFIELD, Lake Village, Arkansas, Attorney for C. A. Mewis.

HON. W. W. HOLLOWELL, Greenville, Mississippi, Attorney for First National Bank of Greenville, Mississippi.

MESSRS. LAUB, ADAMS, FORMAN & TRULY, Natchez, Mississippi, Attorney for City Bank & Trust Company, by Hon. R. B. Forman.

HON. HEISKELL KELLY, United States Department of Agriculture, Little Rock, Arkansas, Attorney for the United States

* * * * * * *

EXHIBIT "C"

Oil Leases and Royalties Farms and Ranch Lands

J. W. K I N G

519 Walker
PHone 3041-R
Greenville, Miss.

October
21
1950

Mr. Jack C. Vaughan,
Natchez, Miss.

Dear Jack:

As you appreciate I have had my mind going the full twenty four hours around the clock since you left here.

Kraemer has taken over just as you told him to do and won't bother a single bit of the crop. He desires working with us and said he would follow through with all.

Naturally have been working on the adjoining place and am going to deliver it too. Brown was down and I sent him across the River to talk with Warfield. Naturally Brown will make you a fine witness as to why you did not make a good crop. (He made less than you).

I have read and re-read your contract with Branson and from what I gather from same, is that you have him in the nine-hole. I don't believe he can budge in this matter. You can give Warfield authority to waive jurisdiction in this case and not have to place yourself where they can get service in the Pipe Line matter, see?

Now then I have figured out one of the best licks for you to handle the old Judge in way of damages, and you will agree with me when we meet again and go over same together. Its a mortal cinch, I believe. Just don't write him any-

thing and when we meet again we can go over this fully. You have the sympathy from all who know you up here and we will all go to the bat for for you as it is necessary.

With best regards, I remain,

Sincerely

s/ J. W. KING

J. W. King

* * * x* * *

EXHIBIT " H "

IN THE DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

IN THE MATTER OF)
JACK C. VAUGHAN,) In Proceedings for a REAL PROPERTY ARRANGEMENT Case No. B-5070
DEBTOR)

ORDER

NOW upon this the 30th day of October, 1951, there comes on for hearing the Petition of C. A. Mewis and Josh Keith, Grady Keith and John Keith, doing business as Keith Brothers, for an Order re payment of rentals and distribution thereof;

And C. A. Mewis appearing by his attorney, Carneal Warfield, and Josh Keith, Grady Keith and John Keith, doing business as Keith Brothers, appearing by Josh Keith,

and their attorney, Carneal Warfield, and Jack C. Vaughan, Debtor-in-possession, appearing by his attorney, W. Tillar Adamson, and Fred P. Branson appearing by his attorney, A. L. Barber, the Court after due consideration of the Petition, upon the testimony of Josh Keith, finds that on the 18th day of December, 1950 C. A. Mewis, as Lessor, entered into a farming lease with Josh Keith, Grady Keith and John Keith, doing business as Keith Brothers, under the terms of which the said Mewis leased to Keith Brothers for a term of two years beginning the 1st day of January, 1951 and ending on the 31st day of December, 1952, that portion of the Florence Plantation commonly known as Seven-Oaks Plantation composed of 423 acres of open land, for a cash consideration of $10.00 per acre on all lands planted in crops other than cotton, and $15.00 per acre for lands planted in cotton, provided that where the yield in cotton should be more than 500 pounds lint cotton per acre, the rental should be $20.00 per acre.

" . . . The Court further finds from the testimony that the cotton produced . . .equals or exceeds 500 pounds of lint cotton per acre . . and . . . that Keith Brothers have approximately 252 bales of cotton ginned and ready for market, and will gather six to eight additional bales . ."

* * * * * *

EXHIBIT "J"

IN THE
CHANCERY COURT OF
CHICOT COUNTY, ARKANSAS

JACK C. VAUGHAN.....PLAINTIFF

VS NO. 7894

FRED P. BRANSON, ET AL.....DEFENDANTS

OPINION

" . . . The testimony in the case was directed to these two issues. The issues here, then, are: (a) did plaintiff properly exercise the option to entitle him to specific performance by conveyance from defendant; and (b) did plaintiff fail to carry out the terms of the Contract relative to the cultivation and harvesting of the crops so as to work a forfeiture of the lease.

" . . . Considering the payment of rent and the $28,000-.00 together, and considering whether or not that money was tendered as required by the contract; first we consider how the tender was made.

"Mr. Hollowell of the First National Bank of Greenville, Mississippi wrote defendant a letter informing him that there was (is) in the bank sufficient money to take up a draft for the estimated amount of rent and $28,000.00 ($29,457.45); and with the letter he enclosed a blank draft and an unexecuted deed and informed defendant if he would execute the deed and

and sign the draft, that is, if he would draft on plaintiff through his bank, with the executed deed attached, when the draft and the deed were received the draft would be paid.

" . . . What was delivered to defendant by the way Mr. Hollowell handled the transaction? He delivered to defendant a blank deed for defendant to execute and a blank whereby and whereon defendant could draft on plaintiff through the Greenville Bank for $29,457.45. To get the money defendant was forced to part with the deed, which he had no part in drawing and which he claims had him conveying land that the contract specifically says he will not convey, upon a promise to pay.

" . . . The Greenville bank could have wired the money to its corresponding bank in Muskogee and had that bank to offer the money to defendant and asked for a deed, or it could have put the amount in the Muskogee bank to be delivered to defendant upon delivery of a deed in accordance with the contract. The law says that payment means in money...If plaintiff had transmitted the amount called for in the option to defendant in Muskogee in any manner recognized in business or banking methods as payment, almost any court would hold this to have been payment. The wording of the contract negatives the method pursued to pay the amount called for in the option, even giving to the method followed its most forceful interpretation in favor of plaintiff.

" . . . So far as the complaint is concerned the opin-

ion might end here; and probably it should. Defendant interposed his plea of failure to properly tend and gather the crops in defeat of the specific performance . . . There was a crop failure but others with as good farms had crop failures in the same area in the same year . . . So the court does not find a failure to properly cultivate and gather the crops as defense to the plaintiff's suit for specific performance, but rests a finding for the defendant on the question of specific performance on the failure of the plaintiff to exercise the option in keeping with the terms of the option as stated in the contract. The complaint of the plaintiff will be dismissed for want of equity . . ."

s/ D. A. BRADHAM

Chancellor

* * * * *

RETURN ON SERVICE OF WRIT

(Number and title omitted) (Filed: June 8, 1953)

I hereby certify and return, that on the 2nd day of June 1953, I received ~~this summons and served it together with the complaint herein as follows~~ the within Summons and Complaints: At Oxford, Miss., and on the 3rd day of June 1953, I served the within named defendant J. W. King by handing him a copy of the summons and complaint personally at Greenville, Miss., and on ~~the 4th day of June~~ June 4th 1953, I served the within named defendant First National Bank of

Greenville, Miss., by handing a copy of the summons and complaint to Wade W. Hollowell president of said Bank personally at Greenville, Miss.

This the 4th day of June, 1953.

John W. T. Falkner IV

By: s/ EDWARD M. GUICE

Deputy United States Marshal

* * * * * *

MOTION TO DISMISS

(Number and title omitted) (Filed: July 18, 1953).

Now comes The First National Bank of Greenville, one of the defendants herein, by its attorneys, and moves the Court to dismiss the complaint filed in this cause on the following grounds, to-wit:

- 1 -

Jack C. Vaughan, plaintiff herein, is a citizen of the State of Mississippi, having his residence in Adams County, Mississippi. The defendants are likewise both citizens of Mississippi. Accordingly, diversity of citizenship does not, in truth and in fact, exist in this cause, despite the allegations of the complaint to the contrary.

- 2 -

This Court is without jurisdiction over the persons to this controversy.

The complaint fails to state a claim upon which relief can be granted.

Defendant offers in support of its motion attacking the jurisdiction of this Court, a conformed copy of a decree rendered on the 15th day of June, 1953 by the Chancery Court of Adams County, Mississippi, in Cause No. 14,362, on the docket thereof, styled "J. W. King, Complainant, vs. Jack C. Vaughan, Defendant".

s/ W. C. KEADY

119 North Broadway
Greenville, Mississippi
Attorney for The First National
Bank of Greenville

Of Counsel:
FARISH, KEADY & CAMPBELL
GREENVILLE, MISSISSIPPI

CERTIFICATE

I, W. C. Keady, of the firm of Farish, Keady & Campbell, Greenville, Mississippi, attorneys for The First National Bank of Greenville, one of the defendants in the above styled action, do hereby certify that I have this day served a copy of the foregoing Motion to Dismiss upon Jack C. Vaughan, plaintiff, pro se, by mailing to him, postage prepaid, a copy of said Motion at his last given mailing address, to-wit: P. O. Box 1373, New Orleans 10, Louisiana, and also by serving Hohorable R. V. Kimble, Jr., 205 Weinberg Building, Greenville, Mississippi, attorney for J. W. King, co-defendant, a copy thereof.

This 17th day of July, 1953.

s/ W. C. KEADY

Of Counsel for The First National Bank of Greenville

* * * * * *

C O P Y

STATE OF MISSISSIPPI — IN THE CHANCERY COURT

COUNTY OF ADAMS — TO JUNE TERM A. D. 1953

J. W. King, — Complainant

-vs- — C. #14,632

Jack C. Vaughan, — Defendant

FINAL DECREE

This cause coming on this day to be heard in Open Court during regular term time before the undersigned Chancellor, and it appearing to the satisfaction of the Court that the defendant, Jack C. Vaughan, has been duly and legally served with process in the manner and for the time required by law, and that an appearance by said defendant, Jack C. Vaughan, was due at this term of Court and that said defendant, Jack C. Vaughan, has wholly made default in the premises.

That a motion for a decree pro confesso was duly filed and a decree pro confesso was so ordered, adjudged, decreed, signed and executed by this Court.

That said defendant, Jack C. Vaughan, still remains wholly

in default in the premises and in said cause and now on motion by complainant to this Court for a Final Decree in said cause and after this Court having duly examined the Bill of Complaint filed herein by complainant against the defendant, Jack C. Vaughan, and having also duly examined all pleadings in said cause, including the process in said cause, and after having duly examined witnesses in open court, under oath, the Court finds the following facts, to-wit:

(1)

That the defendant, Jack C. Vaughan, is an adult resident citizen of Natchez, Adams County, Mississippi. That said defendant resides and lives with his wife and two children at "Arlington" in said city. That the Deputy Sheriff attempted to serve Jack C. Vaughan on one occasion with a lawful summons but Jack C. Vaughan represented himself to be another person other than himself to the Deputy Sheriff; therefore, on said occasion, due to the misrepresentations made by Jack C. Vaughan, the process was not legally and lawfully executed, but on the 25th day of April, 1953, Deputy Sheriff William Hebert duly and legally served the defendant, Jack C. Vaughan with process in the manner as set out in Section 1859 of the Mississippi Code of 1942 Annotation, Sub-section (3), in the following words and figures, to-wit:

"I have this day executed the within writ on Jack C. Vaughan the within named defendant, by posting a true copy of the same on the door of defendant's

usual place of abode in my county. The defendant could not be found in my county, nor could I find any member of said defendant's family over the age of sixteen willing to receive the same at Jack C. Vaughan's usual place of abode.

This the 25th day of April, 1953.

Audley B. Conner, Sheriff

By Wm. I. Hebert, D. S."

The Court, therefore, adjudges and decrees that the said defendant, Jack C. Vaughan, is an adult resident citizen of Natchez, Adams County, Mississippi, residing with his family at one of the old homes of said city known as "Arlington", and that this is the said defendant's usual place of abode and that said process was in compliance with Section 1859 of the Mississippi Code of 1942, and that on this occasion the said defendant, Jack C. Vaughan, has been duly and legally served with process in the manner and for the time required by law, and that an appearance by said defendant, Jack C. Vaughan, was due at this term of Court and that said defendant, Jack C. Vaughan, has wholly made default in the premises.

(2)

That complainant is an adult resident citizen of Greenville, Washington County, Mississippi; that defendant is an adult resident citizen of Natchez, Adams County, Mississippi.

(3) . . .

(4) . . .

(5) . . .

(6) . . .

(7) . . .

(8) . . .

IT IS NOW THEREUPON AND HEREBY ordered, adjudged and decreed that the said defendant, Jack C. Vaughan, is indebted to the complainant, J. W. King, in the amount of Six Thousand Two Hundred and Fifty ($6,250.00) Dollars, that J. W. King do have and recover of and from Jack C. Vaughan the sum of $6,-250.00 and judgment is hereby rendered in favor of the said J. W. King, complainant, and against the said Jack C. Vaughan, defendant, for said amount of Six Thousand Two Hundred Fifty ($6,250.00) Dollars, together with interest at the rate of 6% from this date, and all costs of this proceeding: for all of which let execution issue.

ORDERED, ADJUDGED AND DECREED this 15th day of June, A. D., 1953.

s/ F. D. Hewitt

Chancellor

* * * * *

MOTION TO DISMISS

(Number and title omitted) (Filed: July 21, 1953)

NOW COMES J. W. King, one of the defendants in the above styled and numbered cause, by his attorney R. V. Kimble, Jr., and moves the Court as follows:

1. To dismiss the action as to the defendant, J. W. King, for the reason that the complaint fails to state a claim against the said defendant, J. W. King, upon which relief can be granted.

2. To dismiss the action as to all parties on the grounds that this Court is without jurisdiction over the parties to the controversy because all are actually residents of the state of Mississippi, as shown by the attached conformed copy of the Decree of the Chancery Court of Adams County, Mississippi, rendered June 15, 1953; and as will be further shown by the testimony of witnesses upon the hearing of this motion.

s/ R. V. Kimble, Jr.
ATTORNEY FOR J. W. KING

CERTIFICATE

I, R. V. Kimble, Jr., of the firm of Harty and Kimble, Attorneys for J. W. King of Greenville, Mississippi Greenville, Mississippi, one of the defendants in the above styled and numbered cause, do hereby certify that I have this day served a copy of the foregoing motion to dismiss upon Jack C. Vaughan, plaintiff, by mailing to him, postage prepaid, a copy of said motion at his last given mailing address, to-wit: Post Office Box 1373, New Orleans 10, Louisiana, and also have mailed a copy hereof to the Honorable W. C. Keady, 119 North Broadway, Greenville.

This the 20th day of July, A. D. 1953.

R. V. Kimble, Jr.
Attorney for J. W. King

MOTION TO DISREGARD EFFECT OF UNJUST DECREE

(Number and title omitted) (Filed: July 27, 1953)

The Plaintiff, Jack C. Vaughan, respectfully moves the Court to disregard as a complete nullity the Final Decree filed heretofore in this cause, which said Final Decree was rendered by the Chancery Court of Adams County, State of Mississippi, on the 15th day of June, A. D., 1953, in the cause entitled "J. W. King vs. Jack C. Vaughan. C. #14,632" and all the proceedings taken and rights acquired thereunder, upon the grounds that:

(1)

The defendant therein, Jack C. Vaughan, was never properly served with process.

(2)

The defendant therein, Jack C. Vaughan, had no "usual place of abode" in Adams County, Mississippi on the 25th day of April, 1953, upon the door of which any writ could be posted; he having:

a. On August 27, 1952, determined to become a citizen of Louisiana.

b. On September 27, 1952, removed his household and personal effects to Louisiana.

c. On December 31, 1952, abandoned his voting rights in Mississippi.

d. On January 9, 1953, publicly renounced his Mississippi citizenship by filing his "Declaration of

Domicile" in Louisiana.

e. On March 16th, 1953, had his federal income tax (1952) return filed in Louisiana.

f. Been gainfully, continuously and uninterruptedly employed in a manufacturing plant in Louisiana from October 7th, 1952, until well past the date of 25th of April, 1953.

(3)

Through no fault of the said Jack C. Vaughan, defendant therein, the said Final Decree has become final; he not having learned of its existence until July 20, 1953 — which date was long past the date permitted an appeal or review.

(4)

By the secrecy employed by the complainant, J. W. King, to obtain said Final Decree; the defendant therein, Jack C. Vaughan was denied the right of removal to a Federal Court, all jurisdictional factors being present which would permit such a removal.

(5)

Plaintiff here, the said Jack C. Vaughan, verily believes that the said Final Decree was fraudulently and maliciously obtained by the said J. W. King for the sole purpose of circumventing beforehand any possible determination unfavorable to J. W. King, et al by the District Court of the United States for the Eastern District of Ar-

kansas in the event of a remand by the United States Circuit Court of Appeals For The Eighth Circuit, St. Louis, Missouri, in the case now before it:

JACK C. VAUGHAN, Appellant

vs. #14,814

CARNEAL WARFIELD
C. A. MEWIS and MRS. C. A. MEWIS
B. H. KRAEMER and MRS. B. H. KRAEMER
J. W. KING
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI
JOSH KEITH, GRADY KEITH and JOHN KEITH
d/b/a KEITH BROTHERS,
Appellees.

(6)

The EX PARTE language of the said Final Decree is an unwarranted, degrading, and malicious libel.

(7)

The Complainant, the said J. W. King, is verily believed to be the same person as JEWEL KING, a former felon, who was convicted of fraud under Federal law. Hence, if such be true, the credibility of any allegation or complaint made by him should not sustain a decree pro confesso; and especially where for want of notice and service of process, the defendant therein, Jack C. Vaughan, was denied the right to cross-examine the said J. W. King, believed to be alias JEWEL KING, or his witnesses, or to have a jury pass on his or their credibility.

s/ JACK C. VAUGHAN

Jack C. Vaughan Plaintiff
4440 Chef Menteur Highway
New Orleans, Louisiana

N O T E

In support of the foregoing MOTION TO DISREGARD EFFECT OF UNJUST DECREE, plaintiff, Jack C. Vaughan, herewith files his STATEMENT OF THE CASE; AFFIDAVIT OF PLAINTIFF; AND MOTION FOR SUMMARY JUDGMENT, together with Exhibits.

This the 25th day of July, A. D., 1953.

s/ JACK C. VAUGHAN

Jack C. Vaughan Plaintiff
4440 Chef Menteur Highway
New Orleans, Louisiana
MAILING ADDRESS:
P. O. Box 1373
New Orleans 10, Louisiana

* * * * * *

STATEMENT OF THE CASE; AFFIDAVIT OF PLAINTIFF;

AND MOTION FOR SUMMARY JUDGMENT.

(Number and title omitted) (Filed: July 27, 1953)

The Plaintiff herein, Jack C. Vaughan, respectfully shows the Court:

(1)

That this is an action in which the Plaintiff seeks recovery of damages and losses in the sum of One Hundred and Eighty Three Thousands and Five Hundred and Forty-Two and 55/100 Dollars ($183,542.55), together with his costs and other relief, from the Defendants.

(2)

Plaintiff refers to the Complaint and Exhibits therein

for a more particular statement of the cause of action.

(3)

Plaintiff verily believes that there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law.

(4)

As alleged more particularly in the Complaint:

(a) Plaintiff is a citizen of Louisiana (Par. 1 of Compl't)

(b) Defendants are citizens of Mississippi (Pars. 2 & 3).

(c) Plaintiff seeks recovery of damages and losses in the sum of $183,542.55, together with his costs, against the Defendants (Pars. 4 & 15 of the Complaint).

(d) On March 28, 1950, Plaintiff became equitable owner in possession of some 3,720 acres of farm and pasture lands, known as "Florence" Plantation, in Chicot County, Arkansas, and subject to payment of certain sums to one, Fred P. Branson, of Muskogee, Oklahoma, was entitled to legal title to the lands. (Par. 5 of the Complaint).

(e) Plaintiff's efforts vastly increased the value of his equity (Pars. 6 & 7 of the Complaint).

(f) Plaintiff arranged for all additional funds needed to obtain full legal title to the lands known as "Florence" Plantation (Par. 8 of the Complaint).

(g) Defendant First National Bank of Greenville, Mississippi, became Plaintiff's sole agent to conclude the transaction (Par. 9 of the Complaint), the said Bank to receive joint-

ly with its agent, defendant J. W. King, a fee or commission of $6,250.00 (Par. 10).

(h) Defendants First National Bank and J. W. King then brought in an Arkansas lawyer to handle all legal matters involved (Par. 10); but known to them, and unknown to the Plaintiff, the said Arkansas lawyer was either already representing, or subsequently thereto represented, an adverse party; a so-called prospective "purchaser" named Mewis (par. 10). Plaintiff paid the Arkansas lawyer a $500.00 retainer (Par. 10).

(i) At the instance of his agents, one Kraemer was placed in possession of the lands by the Plaintiff for the purpose of looking after Plaintiff's interests (Par. 11 of the Complaint. Through him the prospective "purchaser", Mewis, fraudulently obtained possession of "Florence" Plantation. (Par, 11).

(j) Defendants First National Bank of Greenville, and J. W. King, and the so-called prospective "purchaser", Mewis, now having lured plaintiff from possession through the use of Kraemer, and a so-called $75,000.00 "offer"; the Arkansas lawyer and Mewis now completely froze Plaintiff out of repossession of "Florence" Plantation by secretly and fraudulently placing certain Keith Brothers in possession of the farming lands for the years 1951 and 1952. Mewis then obtained the legal title from the said Branson. And Plaintiff received not one cent of the so-called "offer" of $75,000.00 made him

by the Defendants First National Bank of Greenville, and J. W. King (Par. 12 of the Complaint).

(k) The Chancery Court of Chicot County, Arkansas, then held that due to the negligence of the Defendant First National Bank of Greenville in the manner in which the funds provided it were handled; Plaintiff was not entitled to legal title to "Florence" Plantation (Par. 13 of the Complaint. See also conformed copy of findings of the Chancery Court of Chicot County, Arkansas, Docket No. 7894, entitled "Jack C. Vaughan, Plaintiff VS. Fred P. Branson, et al", which decree was rendered on August 22nd, 1951, attached hereto and marked Exhibit "H".)

(l) Due to the fraudulent acts on the part of Defendants, Plaintiff sustained damages and losses aggregating the sum $183,542.55 (Pars. 12, 14 & 15 of the Complaint).

The Complaint was duly verified by the Plaintiff, and filed on June 1st, 1953. As shown by Plaintiff's MOTION TO STRIKE (Paragraph 1) mailed to this Court on June 15th, 1953, practically this same action had been filed by Plaintiff on May 13th, 1952 in the form of a Cross-Bill. Later dismissed without prejudice to bring a new action.

(5)

Service of process on the Defendants was had on the Defendant J. W. King on the 3rd day of June, 1953 and on the Defendant First National Bank of Greenville, Mississippi, on the 4th day of June, 1953 as shown by the Marshal's RETURN

OF SERVICE OF WRIT.

(6)

On or about July 20th, 1953, Plaintiff received through the United States Mails from one purportedly W. C. Keady, of the law firm of Farish, Keady & Campbell, Greenville, Mississippi, attorney for the defendant, First National Bank of Greenville, a MOTION TO DISMISS, accompanied by what purports to be a conformed copy of a decree rendered on the 15th day of June, 1953, by the Chancery Court of Adams County, Mississippi, in cause No. 14,362, on the Docket thereof, styled "J. W. King, Complainant vs. Jack C. Vaughan, Defendant". The said MOTION TO DISMISS alleged:

a. That Jack C. Vaughan, plaintiff herein, is a citizen of the State of Mississippi, having his residence in Adams County, Mississippi.

b. The Court is without jurisdiction over the persons to this controversy.

c. The Complaint fails to state a claim upon which relief can be granted.

No other allegations of the Complaint, other than its Paragraph 1., are denied; and the above purported MOTION TO DISMISS was unverified.

(7)

On or about July 21st, 1953, Plaintiff received through the United States Mails from one purportedly R. V. Kimble, Jr., of the law firm of Harty & Kimble, Greenville, Missis-

sippi, attorney for the Defendant, J. W. King, a purported copy of the said J. W. King's MOTION TO DISMISS, which alleged:

a. That the Complaint fails to state a claim against the said Defendant, J. W. King, upon which relief can be granted.

b. That this Court is without jurisdiction over the parties to the controversy because all are actually residents of the State of Mississippi as shown by the attached conformed copy of the decree of the Chancery Court of Adams County, Mississippi, rendered June 15th, 1953; and as will be further shown by the testimony of witnesses upon the hearing of this Motion. (No conformed copy of such decree was attached to the copy of the above Motion was served on Plaintiff, but assumes it was the same as he received on or about July 20th, 1953 from Mr. Keady, (6) supra.

Other than its Paragraph 1., no other allegations of the Complaint are denied, and the above purported MOTION TO DISMISS was unverified.

CONCLUSION

The only issue as to any material fact, then, is whether or not Plaintiff is a citizen of Mississippi or a citizen of Louisiana. If he is a citizen of Mississippi, the Court is without jurisdiction and the case must be dismissed. But if plaintiff is no longer a resident or citizen

of Mississippi, but is a resident of and domiciled in Louisiana, then Plaintiff is entitled, as a matter of Law,to summary judgment for the relief prayed. The defendants base their claim that Plaintiff is a citizen and resident of Mississippi upon a Final Decree rendered by the Chancery Court of Adams County, Mississippi. Plaintiff, in response, files herewith his MOTION TO DISREGARD EFFECT OF UNJUST DECREE.(Pages 1, 2, & 3, supra.).

STATE OF LOUISIANA)
) ss.
PARISH OF ORLEANS)

A F F I D A V I T

Jack C. Vaughan, being first duly sworn, states:

(1)

That he is the Plaintiff in the above entitled cause. That on or about July 20th, 1953, he received through the United States Mails from one purportedly W. C. Keady a purportedly conformed copy of a Final Decree rendered on the 15th day of June, A. D. 1953, by the Chancery Court of Adams County, Mississippi, in cause No. 14,362 on the Docket thereof, styled "J. W. King, Complainant vs. Jack C. Vaughan, Defendant".

(2)

Deponent avers that this was the first notice he had that such an action had actually been brought against him, or such a decree had been rendered against him.

(3)

Deponent avers that he has never been personally served with process in the above said cause;and the reason given by J. W. King in his EX PARTE "Final Decree" for not having been able to do so is hereby denied.

(4)

Deponent avers that he has never been even informed through the mails, or by telephone, or otherwise, that such an action or such a decree had been brought and rendered against him.

(5)

Deponent avers that on the 25th day of April, 1953, he had no "usual place of abode" in Adams County, Mississippi, as recited in Sheriff Audley B. Conner's Return,upon the door of which any writ could have been posted since he had long before removed to Louisiana, had become domiciled and employed there, had gone to Louisiana with the intention of becoming a citizen and resident of Orleans Parish therein, had removed his household and personal effects there, had abandoned his voting rights in Mississippi, had filed his tax return in Louisiana, and by means of a Declaration of Domicile filed in the Parish of Orleans, State of Louisiana, had in effect publicly renounced his Mississippi citizenship. In support hereof Plaintiff files herewith the following Exhibits:

EXHIBIT "A":"Declaration of Domicile" recorded in the Mortgage Office for the Parish of Orleans,

in Mortgage Office Book 1850 Folio 457.

EXHIBIT "B": Certificate of CLIFFORD R. FIELD, Clerk of the Circuit Court and County Registrar of Adams County, Mississippi.

EXHIBIT "C": Affidavit of KENNETH R. GLENN, manager of the property whose address is 4440 Chef Menteur Highway, Parish of Orleans, State of Louisiana.

EXHIBIT "D": Letter from U. S. TREASURY DEPARTMENT, Office of the District Director of Internal Revenue, Customhouse, 423 Canal Street, New Orleans 16, Louisiana, signed and SEALED by Mr. George H. HEINTZEN.

EXHIBIT "E": Affidavit of JAMES J. SCANLON, vice-president of the U. S. Optical Corporation.

EXHIBIT "F": Affidavit of JOSEPH L. DOMINICK, Department Head of the U. S. Optical Corporation.

(7)

Deponent avers that with the exception of a short stay in Memphis, Tennessee from on or about May 15th, 1953 to on or about June 6th, 1953, he has resided continuously, openly, and uninterruptedly since September 27th, 1952 at the said 4440 Chef Menteur Highway domicile, New Orleans, Louisiana.

(8)

That up until March 20th, 1953, Deponent avers he made an occasional business trip to Adams County, Mississippi to

look after his land, cattle and farming interests; but since March 20, 1953 his business interests there have been allegedly wrongfully seized and involved in litigation as more particularly described in the complaint filed in the cause of "Jack C. Vaughan vs. City Bank & Trust Company of Natchez", Civil No. 603-Western, in the District Court of the United States for the Southern District of Mississippi, Western Division, filed on March 20, 1953.

(9)

Deponent avers that in July, 1950, one Fred P. Branson, who had been in litigation with the said J. W. King in the case of Campbell vs. Duncan, 84 Federal Supplement, page 732, advised deponent that the said J. W. King was the same person as Jewel King, referred to in the case entitled EX PARTE KING, 200 Federal Reporter page 622, who had been convicted as charged in an indictment which stated: "The said persons aforesaid, and each of them, did then and there conspire, combine, confederate and agree together in devising and intending to devise a certain scheme and artifice to defraud divers persons to the grand jurors unknown, to be effected through and by means of the post office establishment of the United States" (628).

Deponent further avers that on two occasions, and in particular in September, 1951, the said J. W. King, defendant herein, admitted to Deponent that he was the same person as Jewel King, referred to in the said case, "EX PARTE KING", 200 Federal Reporter, page 622.

(10)

s/ JACK C. VAUGHAN

Jack C. Vaughan

SWORN TO AND SUBSCRIBED before me this 24th day of July, A. D. 1953.

s/ GENE FRIEDMAN

NOTARY PUBLIC

My Commission Expires:

AT DEATH

(S E A L)

PLAINTIFF VERILY BELIEVES SAID DECREE WAS FRAUDULENTLY AND MALICIOUSLY PROCURED.

The Plaintiff, Jack C. Vaughan, verily believes that the EX PARTE Final Decree obtained by the Defendant, J. W. King, from His Honor, the Chancellor of the Chancery Court of Adams County, was the result of a fraud practiced on that Honorable Court; and was obtained by the said J. W. King, maliciously, with the aid of, and for the purpose of lending aid to an undisclosed champertor or maintainor.

In the event the Plaintiff's MOTION TO DISREGARD EFFECT OF UNJUST DECREE, by reason of said Chancery Court of Adams County having been without jurisdiction, is overruled by this Court; the Plaintiff, herein, prays the Court that he be allowed to proceed in this cause to do any or all of the following:

a. Bring in additional parties as malfeazors.

b. Proceed by discovery, interrogatories, and otherwise, to show the said King is being, and has been used, as a tool by other interests due to his vulnerability as an alleged former felon.

c. Amend the Complaint and pleadings upon discovery, or the confirmation of additional facts now in Plaintiff's possession.

d. Show that any and all persons involved in said King's obtainment of the Final Decree to be unworthy of credibility.

e. Deny and prove the falsity of each material allegation.

f. Request additional time in which to plead.

g. Petition directly either the United States Supreme Court or the United States Circuit Court of Appeals For The Fifth Circuit for appropriate relief, and to determine any and all matters raised by the injection of this said Final Decree of the said Chancery Court of Adams County, Mississippi, which has now become final, as Plaintiff verily believes, through the means of fraud and secrecy and without notice to the defendant therein, the Plaintiff, herein, Jack C. Vaughan.

h. Petition the United States Circuit Court of Appeals For The Eighth Circuit for appropriate relief, wherein the cause

CARNEAL WARFIELD,
C. A. MEWIS and MRS. C. A. MEWIS,
B. H. KRAEMER and MRS. B. H. KRAEMER,
J. W. KING,
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI,
JOSH KEITH, GRADY KEITH and JOHN KEITH
d/b/a KEITH BROTHERS.

Appellees

is now being tested jurisdictionally to determine whether or not the District Court of the United States for the Eastern District of Arkansas has jurisdiction to determine if the Plaintiff here, the said Jack C. Vaughan, is entitled to recovery of "Florence" Plantation through cancellation of certain instruments, and whether or not the Defendants, herein, the said First National Bank of Greenville, Mississippi and J. W. King, have any right, by reason of alleged frauds, to any real estate commission arising out of a purported sale of the said Jack C. Vaughan's interest in said lands to C. A. Mewis, and other relief. (See "filed" copy of printed Transcript of Record, United States Court of Appeals, Eighth Circuit. No.14,814, Civil. Jack C. Vaughan, Appellant, versus Carneal Warfield, C. A. Mewis and Mrs. C. A. Mewis, B. H. Kraemer and Mrs. B. H. Kraemer, J. W. King, The First National Bank of Greenville, Mississippi, Josh Keith, Grady Keith, and John Keith, d/b/a Keith Brothers, Appellees. Appeal from the United States District Court for the Eastern District of Arkansas, Western Division. Filed May 15, 1953, E. E. Koch, Clerk. Attached hereto and marked Exhibit "G").

i. Employ any other legal or equitable remedy afforded Plaintiff by the Constitution and Laws of the United States of America or its States.

THE EX PARTE LANGUAGE OF THE DECREE IS AN UNWARRANTED, DEGRADING, AND MALICIOUS LIBEL.

(a)

If there was a petition filed by the said J. W. King, defendant herein, prior to obtaining the Final Decree of the Chancery Court of Adams County, Mississippi, the defendant therein, plaintiff here, Jack C. Vaughan, has never seen it.

(b)

If a petition was presented to that said Adams County, Mississippi, Chancery Court, and was not sworn to; it should not have been entertained by that Honorable Court for lack of verification.

(c)

If a petition was presented to that said Adams County, Mississippi, Chancery Court, and was sworn to by the said J. W. King, his credibility is open to grave doubt; for if he truthfully answers Interrogatory No. 5 of MOTION OF PLAINTIFF TO STRIKE MOTIONS FOR SECURITY OF COSTS; AND ALTERNATE MOTION TO REQUIRE ANSWER TO INTERROGATORIES filed in this cause on the 15th day of July, 1953, Plaintiff verily believes that he is the one and same person known as JEWEL KING, convicted and sentenced to the Federal Penitentiary at Atlanta, Georgia for

fraud (page 11,supra); and if all of the Interrogatories propounded to the said J. W. King in the aforesaid motion are truthfully answered in accordance with Rule 33 of the Federal Rules of Civil Procedure, it is believed by Plaintiff that no Court of Equity would entertain any deposition or sworn complaint based upon his credibility without gravely questioning same; and Plaintiff further believes such Court would also seriously question the credibility of his consorts, witnesses, and habitual associates who are aware of his previous activities.

(d)

Plaintiff does not know who drew up the actual Final Decree, and as an officer of that Court, plaintiff verily believes, induced His Honor, the Chancellor of the Chancery Court of Adams County, Mississippi, to sign it. But it is obvious from the face of the Final Decree, itself, that the language used was employed solely to degrade the Plaintiff, herein, Jack C. Vaughan. The language was not warranted by any finding for the complainant therein, J. W. King, of a monetary judgment, for all the Court need say is that the money is owed and judgment accordingly granted.

It is obvious by the choice of the venomous language used throughout the said Final Decree that more was wanted here than a simple, monetary judgment.

Plaintiff verily believes that the public degradation and blackening of his name by, as is verily believed, a former felon who has no name, was the object sought by the said Fi-

nal Decree.

The said Final Decree speaks for itself.

(e)

In the event the plaintiff's MOTION TO DISREGARD EFFECT OF UNJUST DECREE, by reason of said Chancery Court of Adams County having been without jurisdiction, is overruled by this Court; Plaintiff reserves all of his rights to proceed in this cause as set forth hereinbefore (Pages twelve and thirteen, surpa).

MOTION FOR SUMMARY JUDGMENT

WHEREFORE, the Plaintiff herein, Jack C. Vaughan, having fully answered the defendants' motions to dismiss, and the only fact in issue, that of the residence and domicile of plaintiff at the time of institution of this suit; and through means of affidavits of competent persons in support thereof, having shown that since August 27th, 1952, he has no longer been a citizen or resident of Mississippi, but a citizen and resident of the State of Louisiana so far as the jurisdiction of courts is concerned; and therefore having fully shown that the Honorable Chancery Court of Adams County, Mississippi was without jurisdiction of the parties in rendering its Final Decree of the 15th day of June, A. D. 1953 in the cause entitled: "J. W. King vs. Jack C. Vaughan, C #14,632; and; WHEREFORE

There now being no genuine issue as to any material fact

and, therefore, the Plaintiff, Jack C. Vaughan, is entitled to summary judgment against the defendants, First National Bank of Greenville, Mississippi, and J. W. King, as a matter of law; the said Plaintiff, Jack C. Vaughan, respectfully moves the Court to grant him summary judgment jointly, severally, and in the alternative against the defendants First National Bank of Greenville, Mississippi, and J. W. King, as follows: to-wit

a. That this Honorable Court disregard the effect of the Final Decree rendered by the Chancery Court of Adams County, Mississippi, rendered on the 15th day of June, A. D. 1953 in the cause entitled J. W. King vs. Jack C. Vaughan. C # 14,632, and the proceedings taken and rights acquired thereunder, upon the grounds that due to lack of jurisdiction of said Chancery Court of Adams County, Mississippi, as to Jack C. Vaughan, the said proceedings taken thereunder and rights acquired thereunder are totally null and void.

b. That the said Final Decree be held to have been fraudulently and maliciously procured from the Honorable Chancellor of the said Chancery Court of Adams County, Mississippi.

c. That the language of the said EX PARTE Final Decree, fraudulently and maliciously procured from the said Honorable Chancellor, be held to be an unwarranted, degrading, and malicious libel on the part of any and all parties responsible for it.

d. That summary judgment be rendered in favor of Plain-

tiff in the sum of One Hundred and Eighty Three Thousands Five Hundred and Forty-Two and 55/100 Dollars ($183,542.55) together with his costs, and such other relief as is by this Court deemed proper, for which let proper Order and execution issue.

s/ JACK C. VAUGHAN

Jack C. Vaughan Plaintiff
4440 Chef Menteur Highway
New Orleans, Louisiana
MAILING ADDRESS:
P. O. Box 1373
New Orleans 10, Louisiana

C E R T I F I C A T E

I, Jack C. Vaughan, plaintiff, do hereby certify that I have this day served a copy of the foregoing MOTION TO DISREGARD EFFECT OF UNJUST DECREE, and also a copy of the foregoing STATEMENT OF THE CASE; AFFIDAVIT OF PLAINTIFF; AND MOTION FOR SUMMARY JUDGMENT, together with conformed copies of Exhibits thereto, upon the defendant First National Bank of Greenville, Mississippi, by mailing, postage prepaid, copies thereof to Mr. W. C. Keady, of the firm of Farish, Keady & Campbell, 119 North Broadway, Greenville, Mississippi, attorney for the said defendant First National Bank of Greenville; and upon the defendant, J. W. King, by mailing, postage prepaid, copies thereof to Mr. R. V. Kimble, Jr., 205-8 Weinberg Building, Greenville, Mississippi, attorney for the said defendant J. W. King.

This the 25th day of July, A. D. 1953.

s/ JACK C. VAUGHAN

Jack C. Vaughan Plaintiff
4440 Chef Menteur Highway
New Orleans, Louisiana
MAILING ADDRESS:
P.O. Box 1373
New Orleans 10, Louisiana

E X H I B I T "A"

"DECLARATION OF DOMICILE"

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared: JACK C. VAUGHAN who, after first being by me duly sworn, did depose and say:

That he moved into this Parish and State on August 27, 1952; that at that time it was his intention to make this Parish and State his residence and domicile; that he continues in such an intention.

That he makes and files this affidavit for the purpose of establishing his intention.

sig: Jack C. Vaughan

SWORN to and subscribed
before me, this 9th day of
January, 1953.

Sig: Michael H. Bagot, Not. Pub.

NEW ORLEANS, LA. JAN. 9, 1953 11:15 AM. H.RICKERFOR.CLK.

I HEREBY CERTIFY, That this is a true and correct copy of the "DECLARATION OF DOMICILE" recorded in the Mortgage Office for the Parish of Orleans in Mortgage Office Book 1850 Folio 457.

sig. E. J. Brennan, D. R.
.....
Deputy Recorder of the Parish of Orleans

(S E A L)

E X H I B I T "B"

CLIFFORD R. FIELD
CIRCUIT CLERK
Ex-Officio Notary Public
ADAMS COUNTY,
Natchez, Mississippi

STATE OF MISSISSIPPI
COUNTY OF ADAMS

I, the undersigned Clerk of the Circuit Court and County Registrar of Adams County, Mississippi, and the duly qualified custodian of the registration of voters of said County and State, hereby certify that Jack C. Vaughan registered for voting purposes in the Registration Book for the Court House Precinct of Adams County, Mississippi, on September 6th, 1946 and that he was qualified to vote during the years beginning 1946 through the year 1952 but that he is not now a qualified voter in said precinct of Adams County, Mississippi, nor any other precinct of Adams County, Mississippi.

Given under my hand and seal of office this 11th day of April, 1953.

Sig: CLIFFORD R. FIELD

Clerk of the Circuit Court and
County Registrar of Adams County,
Mississippi

(S E A L)

E X H I B I T "C"

STATE OF LOUISIANA }
PARISH OF ORLEANS } ss.

Before me the undersigned authority in and for the State and Parish aforesaid came and appeared KENNETH R. GLENN, manager of the property located at 4440 Chef Menteur Highway, in the City of New Orleans, the Parish of Orleans, and the State of Louisiana, who having first been duly sworn, stated:

(1)

That he is the manager of the said property whose address is 4440 Chef Menteur Highway, located in the City of New Orleans, Parish of Orleans, and State of Louisiana.

(2)

That his records show that one Jack C. Vaughan, who listed a previous address at Natchez, Mississippi, moved to the said 4440 Chef Menteur Highway address on or about September 27, 1952 with household and personal effects.

(3)

That except for the period May 15th, 1953 to on or about June 6th, 1953, the said Jack C. Vaughan, as shown by Affiant's records, has lived continuously and uninterruptedly at the said 4440 Chef Menteur Highway, New Orleans, Louisiana to and including this 24th day of July, A. D. 1953.

S/ KENNETH R. GLENN

AFFIANT

SWORN TO AND SUBSCRIBED before me this 24th day of July, A. D., 1953.

S/ GENE FRIEDMAN

NOTARY PUBLIC

My Commission Expires:

AT DEATH

(S E A L)

(S E A L)

In Replying Refer To:
DIR:NO
COL:P:SHS:s

U. S. TREASURY DEPARTMENT

Office of the District Director of Internal Revenue

Customhouse, 423 Canal Street

New Orleans 16, Louisiana

Mr. Jack C. Vaughan
4440 Chef Menteur Highway
New Orleans, Louisiana

Dear Mr. Vaughan:

In accordance with your request the records of this office were examined for the year 1952 and they disclose the receipt of your income tax return, showing the name and address as indicated above. The return was filed on Form 1040 and received in this office on March 16, 1953. It was assigned serial number OR 719213.

Yours very truly,

George A. Lambert
District Director

By: s/ George H. Heintzen

George H. Heintzen
Acting Assistant Chief,
Returns Processing Branch

(S E A L)

E X H I B I T "E"

Phone Tulane 5221 P. O. Box 391

U. S. OPTICAL CORPORATION

1618 Polymnia Street

New Orleans, La.

ENGINEERS MANUFACTURERS DESIGNERS

In Re: Jack C. Vaughan
4440 Chef Menteur Highway
New Orleans, Louisiana
CLOCK NO. 83

A F F I D A V I T

STATE OF LOUISIANA)
) ss
PARISH OF ORLEANS)

Before me the undersigned authority in and for the Parish and State aforesaid came and appeared JAMES J. SCANLON who having first been duly sworn made oath that at all times during the period October 7th, 1952 to May 15th, 1953, inclusive, he was Vice-President of the U. S. Optical Corporation, 1618 Polymnia Street, New Orleans, Louisiana; and that of his own personal knowledge Jack C. Vaughan, CLOCK NO. 83, was continuously and uninterruptedly employed by the said U. S. Optical Corporation under his direct supervision; that the said Jack C. Vaughan during said period, as shown by the records of said Corporation, resided at 4440 Chef Menteur Highway, New Orleans, Louisiana, and that the Affiant, JAMES J. SCANLON, has on occasion visited him at his said domicile at 4440 Chef Menteur Highway, New Orleans, Louisiana; that the records of the said U. S. Optical Corporation show that the said Jack C. Vaughan was paid weekly continuously and uninterruptedly during the said period of his employment, from October 7th, 1952 to May 15th, 1953, inclusive, beginning with Check No. 6431 for gross pay of $75.00 for the week ending October 11, 1952, to and including May 15th, 1953, at which time he was given gross termination pay of $153.82 by office Check No. 1376; that Mr. Leslie Carpenter, President of the City Bank & Trust Company, Natchez, Mississippi, whom Affiant talked with on the telephone prior to the employment of the said Jack C. Vaughan, gave Mr. Vaughan the highest recommendations, morally and financially and as to his abilities, praised them highly.

s/ JAMES J. SCANLON

JAMES J. SCANLON

SWORN TO AND SUBSCRIBED BEFORE ME the undersigned Notary Public this the 23 day of July, A. D. 1953.

s/ EDNA K. GAUDET
NOTARY PUBLIC

My Commission Expires:

AT DEATH

(S E A L)

E X H I B I T "F"

Telephone Tulane 5221 P. O. Box 391

U. S. OPTICAL CORPORATION

1618 Polymnia Street

New Orleans, La.

ENGINEERS MANUFACTURERS DESIGNERS

A F F I D A V I T

STATE OF LOUISIANA)
) ss
PARISH OF ORLEANS)

Before me the undersigned authority in and for the Parish and State aforesaid came and appeared JOSEPH L. DOMINICK who having first been duly sworn made oath thatat all times during the period October 7th, 1952 and May 15th, 1953, inclusive, he was Department Head of the Assembly and Coating Laboratory of the U. S. Optical Corporation, 1618 Polymnia Street, New Orleans, Louisiana; and that of his own personal knowledge Jack C. Vaughan, Department Head of U. S. Optical Cprporation, was employed continuously and uninterruptedly in an office adjacent to that of Affiant, and that the said Affiant, JOSEPH L. DOMINICK has on occasion visited the said Jack C. Vaughan at his domicile at 4440 Chef Menteur Highway, New Orleans, Louisiana.

s/ JOSEPH L. DOMINICK

JOSEPH L. DOMINICK

SWORN TO AND SUBSCRIBED before me this 23rd day of July, A. D., 1953.

s/ EDNA K. GAUDET
NOTARY PUBLIC

My Commission Expires:

AT DEATH

(S E A L)

E X H I B I T "H"

IN THE

CHANCERY COURT OF

CHICOT COUNTY, ARKANSAS

JACK C. VAUGHAN.....PLAINTIFF

VS. NO. 7894

FRED P. BRANSON, ET AL.....DEFENDANTS

OPINION

This case hinges upon a proper interpretation of a contract between plaintiff and defendant. Defendant, landlord, as lessor leased to plaintiff, tenant, as lessee, what is known as Florence Plantation in Chicot County for agricultural purposes. The contract is in the form of a letter written by plaintiff to defendant on March 28, 1950.

The pertinent portions of this Contract for considera-

tion here are: "Lessor, Fred P. Branson, hereby leases for agricultural purposes the said farm to said Jack C. Vaughan, on the following terms and conditions, to wit:"

"Lessee agrees to plant cotton, the cotton quota of 264 acres, more or less, to corn 200 acres; soy beans and such other crops in the amount of acres as lessee elects."

"The crop as gathered and marketed lessor shall receive 1/5 of the crop without cost of growing, gathering and marketing to lessor. Lessor shall receive no rental for the pasture land."

"If, in the event lessee herein elects, to exercise the option to purchase the said plantation in its entirety on or before December 1, 1950, then and in that event he shall have the right to purchase the entire farm and receive a warranty deed therefor by paying the lessor the crop rent for 1950 and $28,000.00, and lessee assuming the remainder ($24,000.00) due the Connecticut General Life Insurance Company."

"It is agreed between the lessor and lessee that this Contract shall remain in effect for one year, if and in the event lessee exercises the option contained in the last paragraph herein above, but if he does not exercise said option as of December 1, 1950, then this contract of lease and option to buy one half interest in the farm as hereinabove set out shall be for the years 1950, 1951, and 1952, expiring December 31, 1952."

"Any deed or conveyance in whole or part made to lessee under this Contract shall embrace no land on the river side of the present levee but only the land on the land side of the levee on the said Florence Plantation but shall include the pasture rights reserved in the said deed to Anderson-Tully Company on the 1520 acres on the river side of the levee."

Plaintiff Vaughan filed his complaint alleging that he had complied with the terms of the option and was entitled to a deed to the property; but defendant had wrongfully refused to convey and he asked for specific performance.

Defendant Branson filed answer denying proper compliance with the terms of the option to entitle plaintiff to a deed and that he is not entitled to specific performance; and, also, alleged that plaintiff had forfeited the lease by failure to cultivate and gather the crops as he had agreed and denied plaintiff's right to specific performance on that score.

The testimony in the case was directed to these two issues. The issues here, then, are:(a) did plaintiff properly exercise the option to entitle him to specific performance by conveyance from defendant; and (b) did plaintiff fail to carry out the terms of the Contract relative to the cultivation and harvesting of the crops so as to work a forfeiture of the lease.

The burden of proof is upon the plaintiff to show per-

formance of the terms of the option if he is to prevail upon the question of specific performance. The burden of proof devolves upon the defendant if he is to prevail on the question of failure of plaintiff to cultivate and harvest the crops as provided in the lease.

The main question is specific performance based upon compliance with a proper exercise of the option contained in the lease; so that question will receive first consideration. The Contract provides if lessee (plaintiff) elected to purchase, he had; "the right to purchase the entire farm and receive a warranty deed therefor by paying the lessor the crop rent for 1950 and $28,000.00, and lessee assuming the remainder ($24,-000.00) due Connecticut General Life Insurance Company." this was to be done "on or before December 1, 1950".

It is appropriate to consider the law governing this kind of Contract. The case of Watts v. England, 168 Arkansas, turned upon the question of a certain agreement relative to a parcel of land and brought forth a discussion of the difference between an agreement to sell land and an option to sell land. At page 216, the Court said:

> "A contract to be performed in the future, which, if fulfilled results in a sale, is an executory Contract. In other words, an agreement to sell is preliminary to a sale, and is not the sale itself."

> "An option is distinct from a sale of land, or an agreement to sell land. An option, in the proper sense, is

a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a certain time".

Then on 217, the Court says this:

"One of the distinguishing features between an executory contract to sell land and an option is that the latter does not bind the second party to purchase the land." - - - "On the other hand, a contract in which the second party binds himself unconditionally to pay the purchase price is often, for that reason, held to be a contract to purchase."

The general rule is that a contract for the sale of land or for the payment of money, time is not of the essence of the Contract, unless so made by the Contract. The rule is different in the case of an option to purchase and where no money is to be paid upon the purchase until the option is exercised. In options of that nature, time is of the essence of the contract, whether so made by a condition in the option or not, according to the general rule of law and the opinions of our Supreme Court.

On this subject the case of Smith v. Carter, 213 Arkansas 937 (938) says this:

"On September 1, 1942, the parties to this litigation executed what is called a Flexible Farm Lease, and in

doing so employed a blank contract prepared by the Federal Government which referred to appellee as landlord, and the appellant as tenant. It is quite a lengthy document, and when all the blank spaces had been filled it would have constituted a lease and nothing more, except that there was added to the end thereof, the following recital:"

"It is agreed that the tenant may purchase this farm for two thousand dollars ($2,000.00) any time during the life of the lease, payments to be made in ten (10) equal annual payments of two hundred dollars ($200.00) each. If the tenant purchase the farm, any annual rents that have been paid may be counted as payments on farm if enough additional is paid to make any annual payment equal to two hundred dollars ($200.00)."

"This is not a suit to enforce a contract to convey land, in which contracts time is not of the essence, unless made so by the contract. It is rather a suit to enforce an option to buy. The option was entirely with the tenant. He was under no obligation to buy. He could do so or not as he pleased, and in such contracts time is of the essence whether the contract expressly so provides or not." Page 941 (Smith v. Carter - 213 Ark.)

On the question of the enforcement of an option to purchase, 55 Am. Jr. 511, Sec. 41, says this: "Where the option

by its express terms requires that the payment of the purchase money or a part thereof accompanies the optionee's election to exercise the option, the making or tender of the payment specified, unless waived by the optionor, is a condition precedent to the formation of a contract to sell."

Am. Jur. 55, page 508, Sec. 39, says: "If the optionee attaches conditions not warranted by the terms of the option to his acceptance or notice of his election to buy, this of itself amounts to a rejection."

In Bishop v. Melton, 202 Arkansas 732 (734), this is said:

"We think the trial court correctly dismissed the complaint as being without equity. The contract of March 1, 1940, was simply a lease agreement with an option to the lessee to purchase on certain conditions and was made pursuant to and in accordance with the written agreement of December 22nd, 1938. Such a contract is legal and binding upon the parties, and, being in writing, its meaning and import must be determined from the instrument itself, parol evidence not being admissible to show that they intended to make a different contract."

On the question of Form and Medium of Payment, 70 C.J.S. page 220, Section 13, says: "In the absence of agreement otherwise providing, or the consent of the Creditor to receive some other medium, payment may be made only in money."

40 Am. Jur. Page 739, Section 40, says: "In the absence of an agreement to the contrary money is the sole medium of payment."

30 Cyc. 1180, on the subject of Payment, gives this definition of payment. "Payment is the delivery of money or its equivalent by one person from whom it is due to another person to whom it is due."

The case of Walker v. Close, 125 S. 521, a Florida case, and the case of Bank of Columbia v. Hayner, 1 Peters 464 (7 L. Ed. 219) quoted in the Walker v. Close case, were land contract sales, not options. Even in land sales contracts, the court there says:

"The seller ought not to be compelled to part with his property without receiving the consideration, nor the purchaser to part with his money without an equivalent in return; hence, in such cases, if either a vendor or vendee wish to compel the other to fulfill his contract he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal."

Defendant claims that plaintiff was obligated to pay him his share of the crop rent, and $28,000.00, and assume the amount due the Insurance Company; and was not to get any land on the river side of the levee. Then he contends that plaintiff did not make payment or tender of payment of the $28,-

000.00, nor of the amount of rent due, in accordance with the contract; and, also that the deed offered for execution contained land on the river side of the levee. Because of this situation, defendant says he did not execute the papers tendered for execution. The question then is, were the terms of the option complied with. There was no obligation upon plaintiff to pay anything carried in the option clause of the contract, so no question of forfeiture is involved in this phase of this case. Plaintiff did not default in paying the amount carried in the option; neither would he have defaulted had he taken no action relative to paying anything under the option clause. The option granted a right, it imposed no obligation.

Considering the payment of rent and the $28,000.00 together, and considering whether or not that money was tendered as required by the contract; first we consider how the tender was made.

Mr. Hollowell of the First National Bank of Greenville, Mississippi wrote defendant a letter informing him that there was (is) in the bank sufficient money to take up a draft for the estimated amount of rent and $28,000.00, ($29,457.45); and, with the letter, he enclosed a blank draft and an unexecuted deed and informed defendant if he would execute the deed and sign the draft, that is, if he would draft on plaintiff through his bank, with the executed deed attached, when the draft and the deed were received the draft would be paid.

The contract says if lessee elects to exercise the option

to purchase the farm, then he has the right to purchase the farm and receive a deed by paying the lessor the crop rent and the $28,000.00; on or before December 1, 1950. The right to receive the deed was to be secured "by paying" the amounts stated in the option paragraph. The question then is, was the method pursued to exercise the option, the method set out in the option? If it was, then, on the question of paying, the option was properly exercised. If not, then the method adopted fell short of the contractual requirements.

In Pettus v. Rawls, 131 Arkansas 125 (125-7) on the question of payment, this is said: "To constitute payment the money or other thing must pass from the debtor to the creditor for the purpose of extinguishing the debt and the creditor must receive it for the same purpose."

To paraphrase: To constitute payment the money or other thing must pass from the optionee to the optionor for the purpose of exercising the option.

The plaintiff had the right or, otherwise stated, was entitled to receive a deed by paying defendant the crop rent and $28,000.00 on or before December 1, 1950. Plaintiff was to pay money and receive a deed; defendant had a right to receive the money and therefor deliver a deed. Leaving out of consideration everything except the paying, did plaintiff pay anything. To pay or by paying one delivers that which is to be paid to the person entitled to receive. What was delivered to defendant by the way in which Mr. Hollowell

handled the transaction. He delivered to defendant a blank deed for defendant to execute and a blank whereby and whereon defendant could draft on plaintiff through the Greenville Bank for $29,457.45. To get the money defendant was forced to part with the deed, which he had no part in drawing and which he claims had him conveying land that the contract specifically says he will not convey, upon a promise to pay.

Plaintiff says he did all he could have done. If he had paid the amount called for in the option and the defendant had failed to make and deliver to him a deed in accordance with the contract, defendant would have had no defense to a suit in specific performance. The Greenville bank could have wired the money to its corresponding bank in Muskogee and had that bank to offer the money to defendant and asked for a deed, or it could have put the amount in the Muskogee bank to be delivered to defendant upon delivery of a deed in accordance with the contract. The law says that payment means in Money. However, if plaintiff had transmitted the amount called for in the option to defendant in Muskogee in any manner recognized in business or banking methods as payment, almost any court would hold this to have been payment. The wording of the contract negatives the method pursued to pay the amount called for in the option, even giving to the method followed its most forceful interpretation in favor of plaintiff.

The defendant says he was absolved from obligation, also or alone, because of the inclusion of land in the deed on the river side of the levee. Plaintiff impliedly counters by saying while there were lands, on the river side of the levee, described in the deed from W. S. Rode to defendant, they were lands a Mr. Kimbel had acquired by adverse possession, and defendant knew plaintiff would not claim any lands on the river side of the levee and furthermore the deed was only a quit-claim deed anyway.

Passing the nature of the deed, whether Warranty or Quit-Claim, and passing defendant's liability thereunder, the deed from W. S. Rode to defendant Branson describes the land in Sections 4 and 5 as follows:

> "All of fractional section 4; all of fractional section 5, excepting a strip 13 rods wide off of the west side thereof; all in Township 18, South of Range 1 East."

The deed from Defendant Branson to Anderson-Tully Company, as to Sections 4 and 5, describes the land conveyed as: and Section 4, in Township 18 South of Range 1 East which lies north of the fence line running generally East and West through said Sections; all that part of Section 5 (except a strip of land 13 rods wide taken by parallel lines off of the West side thereof) in Township 18 South of Range 1 East, which lies East or South (on the river side) of the main levee on the Southeast Arkansas Levee District and North of the fence line running generally East and West through said Section 5. The land is more particularly described by metes and bounds.

The blank deed Mr. Hollowell sent to defendant Branson to sign carries the description in Sections 4 and 5 as follows:

"All of the fractional Section 4; all of the fractional Section 5, except a strip 13 rods wide off of the west side thereof; all in Township 18 South of Range 1 East." This blank deed also has this exception "also, less and except that portion of all of the above described land lying and being East of the Mississippi River Levee right-of-way as same now exists which has been conveyed to Anderson-Tully by deed dated 10-31-47 and recorded in Record Book "X-5" at page 229 in the office of the Recorder in Chicot County.

In the evidence it is apparently undisputed that there are lands, included in the deed defendant was asked to sign, on the river side of the levee which defendant Branson did not convey to Anderson-Tully Company. Apparently these lands were under adverse possession when defendant Branson bought the place from W. S. Rode, and because of that defendant Branson did not get these lands. However, the deed has Branson conveying lands on the river side of the levee. This is revealed by a review of the descriptions of the lands in Sections 4 and 5 in the three deeds: from Rode to Branson, from Branson to Anderson-Tully Company, and from the blank deed sent by Mr. Hollowell to Branson to execute. Apparently this was the number one objection Branson had to executing the deed. He thought enough of the situation to say in the contract that he would not convey any land on the river side of the levee and evidently had a good reason for so stating in the lease contract. He was called upon to make a special Warranty Deed, and, if he put in lands he knew he

did not own, he may have reasoned that to put those lands in would have been a wilful act of his and he would warrant the title. However, the law is if demands, not found in the option requirement, are made in the exercise of the option, that in effect voids the exercise.

The court finds no element of estoppel in this case which tended to or did estop the defendant from declining to execute the proffered deed and signing that blank draft and returning them as directed to effectuate a conveyance to plaintiff.

The court finds and holds that plaintiff has failed to show by a preponderance of the evidence that he performed the obligations resting upon him in connection with the exercise of the option granted him, sufficient to entitle him to specific performance.

So far as the complaint is concerned this opinion might end here; and, probably it should. Defendant interposed his plea of failure to properly tend and gather the crops in defeat of the specific performance, and he only asks for the complaint to be dismissed for want of equity.

The defendant says that plaintiff, lessee (tenant), under the contract was to plant, cultivate and gather 264 acres of cotton, 200 acres of corn and other crops in a husbandlike manner, that, he did not do; and that the fault was one of his own making, either by acts of commission or of omission.

Plaintiff says that he got started late and defendant knew this, that the lands were in terrible shape and plaintiff knew this, that he did everything he could to properly plant and cultivate the crops but that added to all of the other drawbacks, excessive rains came and necessitated extra poisonings, which he could not have anticipated. That he could not get sufficient poison and for that reason, largely he lost his cotton. That added to this was the misfortune of not being able to get anticipated labor and the loss of his manager in the critical crop season.

On the 264 acres of cotton he made 16 bales and from the 200 acres he gathered no corn. Judging from the production, plaintiff had a crop failure; but upon that alone, this question may not be adjudged.

To review the evidence would serve no useful purpose. The parties and the attorneys are well acquainted with the testimony. The attorneys have filed able briefs; so the court will refer to the testimony rather than review it.

Taking the terminology of the testimony of the witnesses, the court is impressed that the wording "plant 264 acres of cotton" means (meant) to plant, cultivate, and harvest in a husbandlike manner under the conditions prevailing; those anticipated and those not anticipated are not acceptable. The Contract does not set up any particular way of carrying out the farming operation. The landlord

accepted the tenant such as he was and not what he should be, and the tenant accepted the landlord and the land in the same way.

The testimony is in sharp conflict and some of it even inconsistent. The evidence on the method, manner and progress of the gathering was rather meagre; but after all there was not much to gather. When one tries to point to the underlying and moving cause of the failure, the mystery deepens. The biggest thing relied on was excessive rains which called for more labor and poisoning and which prevented getting labor and from getting necessary poison, unless the poison had been contracted early. Just how far the "Act of God" went in that situation is questionable. Plaintiff was bound to anticipate boll weevils and poisoning and that it took poison to poison with; but he contends that he could not anticipate excessive rains and an excessive number of poisonings; and, also, at the same time, antifipate that even if excessive rains came, there would be a shortage of poison. Responsible witnesses testified for each party and the witnesses on both sides justified the position of the party in whose favor they testified.

The defendant here is attempting to establish a forfeiture for failure to perform. Forfeitures are not favored in equity; but, while that doctrine has its force, that force is hardly needed here. The burden is on the defendant. His evidence must preponderate, that is, outweigh, be more convincing, point more directly at the real cause which caused plaintiff

to register a crop failure. If each side stands upon a balance, then the person who does not carry the burden must prevail. There was a crop failure but others with as good farms had crop failures in the same area in the same year. Granting a crop failure, still when taking the prevailing circumstances and the other elements entering into the situation, this court is not able to say that defendant has sustained the burden he assumed; so the court does not find a failure to properly cultivate and gather the crops a defense to the plaintiff's suit for specific performance, but rests a finding for the defendant on the question of specific performance on the failure of the plaintiff to exercise the option in keeping with the terms of the option as stated in the contract.

The complaint of the plaintiff will be dismissed for want of equity. Costs incurred or paid are adjudged against the party who incurred or paid the same. Other costs are adjudged against plaintiff.

Done on this 22nd day of August, 1951.

s/ D. A. BRADHAM
CHANCELLOR

O R D E R

(Number and title omitted)

THIS CAUSE coming on this day to be heard on the motion of the defendant, J. W. King, for dismissal of the above styled and numbered cause of action as to the said J. W. King alone on the grounds that the complaint filed herein fails to state a cause of action as to the said J.W. King on which relief can be granted and the Court, having previously found on consideration of a motion to dismiss this action for lack of the necessary diversity of citizenship as between the parties hereto, that the decree of the Chancery Court of Adams County, Mississippi in Cause No. 14,632, styled 'J. W. King vs Jack C. Vaughn', rendered by the Honorable F. D. Hewitt, Chancellor, on the 15th day of June, 1953, was a just and valid decree, is of the opinion that all disputes between these parties, the said J. W. King and Jack C. Vaughn, arising out of the transaction complained of in the cause now before this Court either have or should have been settled before the Chancery Court of Adams County, Mississippi in its proceedings and that the said decree of the said Chancery Court of Adams County, Mississippi is Res Judicata as to all matters complained of as against the defendant, J. W. King, in this cause.

It is, therefore, Ordered, Adjudged and Decreed that this action should be, and it is hereby dismissed as to the defendant, J. W. King.

ORDERED, ADJUDGED AND DECREED this the 19th day of November, A. D. 1953.

s/ ALLEN COX
District Judge

MOTION TO EXTEND TIME FOR APPEAL

(Number and style omitted) (Filed: December 8, 1953)

Comes now the plaintiff, Jack C. Vaughan, and respectfully moves the Court to extend the time in which Plaintiff may take appeal from this Court's Order of November 19, 1953, in which the action was dismissed as to the Defendant J. W. King.

In support thereof, plaintiff shows that through no fault of his own, he did not learn of the entry of the judgment of this Court until December 3rd, 1953, as shown by the attached AFFIDAVIT OF PLAINTIFF, ETC.

Wherefore, plaintiff prays the Court to enter Order granting plaintiff until close of business January 4th, 1954, to file notice of appeal from the above Order.

s/ JACK C. VAUGHAN
Jack C. Vaughan Plaintiff,
MAILING ADDRESS:
P. O. Box 434,
Main Post Office,
St. Louis 3, Missouri

CERTIFICATE

The undersigned Jack C. Vaughan, Plaintiff, hereby certifies that he has this day served a true copy of the above and foregoing Motion upon the counsel of J. W. King, Mr. R. V. Kimble, Jr., by mailing same, postage prepaid, to him at the address: 205 Weinberg Building, Greenville, Mississippi, this the 7th day of December, 1953

s/ JACK C. VAUGHAN
Jack C. Vaughan

AFFIDAVIT OF PLAINTIFF; AND HIS ELECTION TO STAND UPON THE PLEADINGS, HERETOFORE FILED, AND SUFFER JUDGMENT OF DISMISSAL AS TO DEFENDANT FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, IN ORDER TO FILE APPEAL.

(Number and style omitted) (Filed: December 3, 1953)

STATE OF MISSOURI,)
) ss.
COUNTY OF ST. LOUIS)

Jack C. Vaughan, Plaintiff, being first duly sworn, on oath states:

1.

That he is the Plaintiff in the above styled and numbered cause.

2.

That on November 23, 1953, he mailed a typewritten letter to "Hon. Hubert D. Stephens, Jr., Clerk -- District Court of the United States -- Northern District of Mississippi --- Oxford, Mississippi", requesting advice as to whether Judge Cox had made any disposition of any of the several motions which were before him at the opening of the present Term; and requested certified true copies of any Orders made, together with a certified copy of the Docket entries.

That on December 2nd, 1953, Deponent deposited with Western Union the following telegram:

HON. HUBERT D. STEPHENS, JR., CLERK,
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF MISSISSIPPI,
OXFORD, MISSISSIPPI

HAVE NOT RECEIVED REPLY TO MY LETTER MAILED YOU NOVEMBER TWENTY THIRD REQUESTING YOU ADVISE WHETHER JUDGE COX HAS MADE DISPOSITION OF ANY OF THE SEVERAL MOTIONS WHICH WERE BEFORE HIM AT THE OPENING OF PRESENT TERM IN CASE NUMBER 120, GREENVILLE DIVISION, VAUGHAN VS. FIRST NATIONAL BANK OF GREENVILLE, ET AL. I ALSO REQUESTED CERTIFIED COPY OF THE DOCKET ENTRIES. PLEASE OBLIGE.

JACK C. VAUGHAN,
BOX 434, MAIN POST OFFICE,
ST. LOUIS 3, MISSOURI

4.

That after business hours on December 3rd, 1953, Deponent received through the mails purportedly certified copies of the Order of November 19th, 1953, dismissing the action as to the Defendant, J. W. King; and the Order Requiring Security For Costs of date November 24, 1953. That this was the first notice that Deponent had that such Orders had been made.

5.

The Deponent verily believes that, from his standpoint, further proceedings on his part in this Honorable Court would be useless. Deponent verily believes there are no further issues left to be tried. Deponent verily believes that since this Court has sustained the Chancery Decree of June 15, 1953, holding Plaintiff to be a Mississippi citizen, but which Decree is believed to be void by Deponent; Deponent does not believe this Honorable Court can now entertain jurisdiction of the defendant The First National Bank of Greenville, whose Motion To Dismiss of July 18th, 1953, was based upon the same (allegedly void, according to Plaintiff) Chancery Decree --- Cause No. 14,632, styled 'J. W. King vs Jack C. Vaughn', Chan-

cery Court of Adams County, Mississippi, rendered June 15th, 1953.

s/ JACK C. VAUGHAN
Deponent

STATE OF MISSOURI :

COUNTY OF SAINT LOUIS

Before me the undersigned authority in and for the State and County aforesaid came and appeared Jack C. Vaughan, who having first been duly sworn did state on oath that he is the Plaintiff in the above and foregoing AFFIDAVIT OF PLAINTIFF, ETC., and that the statements contained therein are true of his own personal knowledge, except as stated on information or belief, and as to those he verily believes them to be true.

s/ JACK C. VAUGHAN
Deponent

Sworn to and subscribed before me this the 5th day of December, A. D., 1953.

s/ GEORGE J. HILL
Notary Public

My Commission Expires:
October 16, 1954

(S E A L)

ELECTION TO STAND UPON THE PLEADINGS.

In view of the foregoing, the plaintiff respectfully elects to stand upon the pleadings heretofore filed in this cause, and suffer judgment of dismissal as to the defendant First National Bank of Greenville, Mississippi, in order to present for review by the Appellate Courts the proceedings taken in this cause.

WHEREFORE, plaintiff respectfully moves the Honorable Court to direct the Clerk to enter an Order dismissing this cause of action as to the remaining defendant, The First National Bank of Greenville, Mississippi.

s/ JACK C. VAUGHAN
Plaintiff

MAILING ADDRESS:
P. O. Box 434,
Main Post Office,
St. Louis 3, Missouri

CERTIFICATE

The undersigned Jack C. Vaughan, Plaintiff in the above styled and numbered action, hereby certifies that he has this day served a true copy of the above and foregoing AFFIDAVIT OF PLAINTIFF; AND HIS ELECTION TO STAND UPON THE PLEADINGS, HERETOFORE FILED, AND SUFFER JUDGMENT OF DISMISSAL AS TO DEFENDANT FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, IN ORDER TO FILE APPEAL upon the Defendant, The First National Bank of Greenville, Mississippi, by mailing same postage prepaid to W. C. Keady, 119 North Broadway, Greenville, Mississippi, attorney of record for the said First National Bank of Greenville, which address is that last known to the undersigned.

This the 7th day of December, A. D., 1953.

s/ JACK C. VAUGHAN
Plaintiff.

NOTICE OF APPEAL

(Number and style omitted) (Filed: December 16th, 1953)

Notice is hereby given that Jack C. Vaughan, the Plaintiff herein, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the ORDER of this Court dismissing plaintiff's action as to the Defendant J.W. King: which said ORDER was ordered, adjudged and decreed on the 19th day of November, A. D., 1953.

This the 14th day of December, A. D., 1953.

s/ JACK C. VAUGHAN

Jack C. Vaughan, PLAINTIFF.
MAILING ADDRESS:
P. O. Box 434,
Main Post Office,
St. Louis 3, Missouri

C E R T I F I C A T E

The undersigned, Jack C. Vaughan, certifies that he mailed a true copy of the above and foregoing NOTICE OF APPEAL to R. V. Kimble, Jr., attorney for the defendant, J. W. King, mailing same, postage prepaid, to the said Mr. Kimble at his last stated address: 205-8 Weinberg Building, Greenville, Mississippi.

This the 14th day of December, A. D., 1953.

s/ JACK C. VAUGHAN

Jack C. Vaughan Plaintiff,
P. O. Box 434,
Main Post Office,
St. Louis 3, Missouri

REQUEST FOR CERTIFICATION AND TRANSMITTAL OF PORTION OF RECORD TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

(Number and style omitted) (Filed: December 23rd, 1953)

TO THE CLERK OF THE ABOVE DISTRICT COURT OF THE UNITED STATES:

Under the provisions of Rule 75(j) of the Federal Rules of Civil Procedure, the plaintiff, Jack C. Vaughan, desiring to docket the appeal in order to make in the appellate court motion for intermediate order, hereby requests that you certify and transmit to the United States Circuit Court of Appeals for the Fifth Circuit, for docketing prior to the time the complete record on appeal is settled and certified, the following papers (copies of which are hereby furnished you, inclosed with this request for comparison with original documents on file in your office, and your certification):

1. The Complaint, filed June 1, 1953, together with the following exhibits thereto:

a. EXHIBIT "A": Vaughan-Branson Contract of 3/28/50;

b. " "B": Letter, Vaughan to King of 9/18/50;

c. " "C-1": " , Bank to Branson of 10/30/50;
"C-2": " , " " " " 11/27/50;

d. " "D": Cross-Examination of W.W. Hollowell;

e. " "E-1":)
"E-2":) Vaughan to Warfield, $500 Retainer;
"E-3":)

f. EXHIBIT "F": Appearances in Matter of Vaughan.

g. " "G": Letter, King to Vaughan, 10/21/50.

h. " "H": Excerpts from Order 10/30/51 in the Matter of Vaughan.

j. " "J": Excerpts from opinion of Chancery Court of Chicot County, Ark., Vaughan v. Branson, No. 7894.

2. The Marshal's Return On Service Of Writ (Executed on June 4, 1953), filed on June 8, 1953.

3. Motion to Dismiss, filed by the Defendant, The First National Bank of Greenville, July 18, 1953, together with the following pertinent excerpts from the Final Decree of the Chancery Court of Adams County, Miss., No. 14,632 ---- King vs. Vaughan ---- to-wit:

all of the said Final Decree excepting paragraphs (3), (4), (5), (6), (7), and (8).

4. Motion to Dismiss, filed by the Defendant, J.W. King, July 21st, 1953.

5. Motion To Disregard Effect of Unjust Decree, filed by Plaintiff 27th July, 1953.

6. Statement Of The Case, Affidavit of Plaintiff; And Motion For Summary Judgment, filed by Plaintiff 27th July, 1953, together with the following exhibits thereto:

a. EXHIBIT "A": Declaration of Domicile;

b. " "B": Certificate of Clifford R. Field;

c. " "C": Affidavit of Kenneth R. Glenn;

d. EXHIBIT "D": Ltr U.S. Treas. Dept to Vaughan;

e. " "E": Affidavit of James J. Scanlon;

f. " "F": Affidavit of Joseph L. Dominick;

h. " "H": Opinion in Vaughan v. Branson, #7894, Chicot Co., Ark., Chancery Court.

7. Order of November 19, 1953, dismissing action as to the Defendant, J. W. King.

8. Order of November 24, 1953 requiring security for costs.

9. Motion To Extend Time For Appeal, filed Dec. 8, 1953.

10. Affidavit Of Plaintiff; And His Election To Stand Upon The Pleadings, Heretofore Filed, And Suffer Judgment Of Dismissal As To The Defendant First National Bank Of Greenville, Mississippi, In Order To File Appeal. Filed Dec. 8, 1953.

11. Notice Of Appeal, filed December 16, 1953.

12. Copy of this Request for Certification, Etc.

13. Clerk's Certificate.

You are further requested to submit your charges for same to the undersigned by return mail; and upon your receipt of payment for same, to forward the foregoing portion of the record, duly certified by you, to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, New Orleans, Louisiana for docketing.

s/ JACK C. VAUGHAN

Jack C. Vaughan, Plaintiff-Appellant
MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

C E R T I F I C A T E

The undersigned, Jack C. Vaughan, hereby certifies that he mailed a true copy of the above and foregoing Request For Certification And Transmittal Of Portion Of Record To The United States Circuit Court Of Appeals For The Fifth Circuit, together with a certified true copy of Notice Of Appeal, filed December 16, 1953, to the Honorable Oakley F. Dodd, Clerk, United States Circuit Court Of Appeals For The Fifth Circuit, postage prepaid, this the 21st day of December, A.D., 1953.

s/ JACK C. VAUGHAN
Jack C. Vaughan, Plaintiff-Appellant.

CLERK'S CERTIFICATE

I, HUBERT D. STEPHENS, JR., Clerk of the United States District Court for the Northern District of Mississippi, do hereby certify the foregoing 91 pages contain a true and correct transcript of the following:

(1) Complaint and Exhibits attached thereto. (Filed: June 1, 1953)

(2) Marshal's Return of Service of Writ. (Filed: June 8, 1953)

(3) Motion To Dismiss of First National Bank of Greenville. (Filed: July 18, 1953)

FINAL DECREE of Adams County Chancery Court, in the Cause - 'J. W. King vs. Jack C. Vaughan', No. 14,632, rendered June 15, 1953 - EXCEPTING and omitting pars. (3), (4), (5), (6), (7), and (8) thereof.

(4) Motion To Dismiss of J. W. King. (Filed: July 21, 1953)

(5) Motion To Disregard Effect Of Unjust Decree. (Filed: July 27, 1953)

(6) Statement Of The Case; Affidavit Of Plaintiff; And Motion For Summary Judgment, together with the following Exhibits thereto: "A", "B", "C", "D", "E", "F", and "H". (Filed: July 27, 1953)

(7) ORDER of November 19, 1953, dismissing action as to the defendant, J. W. King.

(8) Motion Of Plaintiff To Extend Time For Appeal. (Filed: December 8, 1953)

(9) Affidavit Of Plaintiff; And His Election To Stand Upon The Pleadings, Heretofore Filed, And Suffer Judgment Of Dismissal As To Defendant First National Bank of Greenville, Mississippi, in Order To File Appeal. (Filed: December 8, 1953.

(10) Notice Of Appeal. (Filed December 16, 1953)

(11) Request For Certification And Transmittal Of Portion Of Record To The United States Circuit Court Of Appeals For The Fifth Circuit. (Filed: December 23, 1953)

in the cause entitled: JACK C. VAUGHAN versus THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING, Number 120 (Greenville Division), of the Civil Action Docket of this Court.

WITNESS my hand and Seal of said Court at Oxford, Mississippi, this the 25 day of March, A.D., 1954.

HUBERT D. STEPHENS, JR., CLERK

By: s/ GENA S. LAMB
Deputy Clerk

(S E A L)

SUPPLEMENTAL

TRANSCRIPT OF RECORD

UNITED STATES

COURT OF APPEALS

FIFTH CIRCUIT

No. 14,921

JACK C. VAUGHN,
Appellant,

versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, AND J. W. KING

Appellees.

Appeal from the United States District Court for the Northern District of Mississippi.

ORIGINAL RECORD RECEIVED

U. S. Court of Appeals
FILED
May 3 1954
Oakley F. Dodd, Clerk

I N D E X

	Page
ORDER of March 6th, 1954, dismissing the action as to the remaining defendant, the First National Bank of Greenville, Mississippi.	92
NOTICE OF APPEAL, filed March 31st, 1954	93
DESIGNATION OF RECORD filed March 31st, 1954 . . .	94
STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL filed March 31st, 1954.	95
CLERK'S CERTIFICATE.	98

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IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JACK C. VAUGHAN PLAINTIFF

vs. Civil Action No. 120

THE FIRST NATIONAL BANK OF GREENVILLE
and J. W. KING DEFENDANTS

ORDER

This cause having come on to be heard upon the motion of THE FIRST NATIONAL BANK OF GREENVILLE to dismiss the complaint herein of JACK C. VAUGHAN for his failure to give security for costs pursuant to order entered in this cause under date of November 24, 1953, and it appearing that more than sixty days have elapsed from the date of the said prior order requiring costs and that Jack C. Vaughan, plaintiff, has failed to give security for costs in the manner provided by law or to show good cause why he should not be required to furnish such security, and it further appearing to the Court from the pleadings on file that Jack C. Vaughan, plaintiff, does not propose to comply with the order of the court regarding security for costs and that the motion of The First National Bank of Greenville is well taken and should be sustained;

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the

~~1954~~ 96

complaint of Jack C. Vaughan be and the same is hereby dismissed as to The First National Bank of Greenville, one of the defendants in said action, for failure to provide security for costs.

ORDERED, ADJUDGED and DECREED, this 6th day of March, 1954.

s/ ALLEN COX

District Judge

* * * *

NOTICE OF APPEAL

(Number and style omitted) (Filed: March 31st, 1954)

Notice is hereby given that Jack C. Vaughan, the plaintiff, herein, hereby appeals to the United States Circuit Court of Appeals for the Fifth Circuit from the ORDER of this Court dismissing plaintiff's action as to the defendant, The First National Bank of Greenville; which said ORDER was ordered, adjudged and decreed on the 6th day of March, A. D., 1954.

This the 29th day of March, A. D., 1954.

s/ JACK C. VAUGHAN

Jack C. Vaughan, Plaintiff
MAILING ADDRESS:
P. O. Box 434,
Main Post Office,
St. Louis 3, Missouri

193+97

C E R T I F I C A T E

The undersigned, Jack C. Vaughan, plaintiff-appellant, certifies that he mailed a true copy of the above and foregoing NOTICE OF APPEAL to W. C. Keady, attorney for the defendant, The First National Bank of Greenville, Mississippi, mailing same postage prepaid, in an envelope addressed to the said Mr. Keady at his last stated address: 119 North Broadway, Greenville, Mississippi; and deposited in the United States Mails at Little Rock, Arkansas.

This the 29th day of March, A. D., 1954.

s/ JACK C. VAUGHAN

Jack C. Vaughan

* * * *

DESIGNATION OF RECORD

(Number and style omitted) (Filed: March 31st, 1954)

TO THE CLERK OF THE DISTRICT COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI:

Plaintiff-appellant, Jack C. Vaughan, herewith designates the following additional portions of the record and proceedings herein which he deems should be contained in the record on appeal of this cause to the United States Court of Appeals for the Fifth Circuit: to-wit

1954.

78

a. ORDER, dated March 6, 1954, dismissing the action as to the remaining defendant, The First National Bank of Greenville, Mississippi;

b. STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL, attached hereto;

c. This DESIGNATION OF RECORD

Other certified portions of the record and proceedings have heretofore been forwarded by you, on January 2nd, 1954, to the Clerk of the above Court of Appeals and there filed and docketed in the cause, styled as above, No. 14,921, and designated by appellant in the appellate court to be contained in the printed or mimeographed record. Service of said designation was made upon appellees on February 22nd, 1954. You are requested to certify and transmit to the above Court of Appeals the above matters: a, b and c; copies for comparison and certification being herewith furnished you.

S/ JACK C. VAUGHAN

Jack C. Vaughan, plaintiff-appellant
MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

(Number and style omitted) (Filed: March 31st, 1954)

Appellant, Jack C. Vaughan, proposes on his appeal in the above styled cause to rely on the following points as

error:

1.

The District Court erred in dismissing the action as to the defendant J. W. King on grounds that the complaint fails to state a cause of action.

2.

The District Court erred in holding that the decree of the Chancery Court of Adams County, Mississippi, in the cause No. 14,632, styled "J. W. King vs. Jack C. Vaughan" rendered on June 15th, 1953, was a just and valid decree. Said decree was void and a nullity as the said Chancery Court lacked jurisdiction.

3.

The District Court should have awarded summary judgment for plaintiff Vaughan against the defendants, The First National Bank of Greenville, Mississippi and J. W. King.

4.

Upon plaintiff's motion to dismiss as to the remaining defendant, the District Court, under Rule 40(a)(2) of the Federal Rules of Civil Procedure, should have then dismissed upon terms and conditions it deemed proper insofar as plaintiff's motion for dismissal was concerned. The District Court erred in ignoring plaintiff's motion;

erred in waiting almost three months for another cause for dismissal, under Rule 41(b), to ripen; and erred in dismissing for the latter cause upon the remaining defendant's motion to dismiss.

S/ JACK C. VAUGHAN

Jack C. Vaughan Appellant
MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

C E R T I F I C A T E

The undersigned Jack C. Vaughan, appellant herein, certifies that he served true copies of the above and foregoing DESIGNATION OF RECORD and STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL upon Mr. W. C. Keady, attorney for the appellee The First National Bank of Greenville, Mississippi, by mailing same postage prepaid, in an envelope addressed to the said Mr. Keady at his last stated address; 119 North Broadway, Greenville, Mississippi, and deposited in the United States Mails at Little Rock, Arkansas;

And the said Jack C. Vaughan further certifies that he served true copies of the above and foregoing DESIGNATION OF RECORD and STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL upon Mr. R. V. Kimble, Jr., attorney for the appellee J. W. King, by mailing same postage prepaid, in an envelope addressed to the said Mr. Kimble at his last sta-

ted address: 205-6 Weinberg Building, Greenville, Mississippi; and deposited in the United States Mails at Little Rock, Arkansas;

This the 29th day of March, A. D., 1954.

s/ JACK C. VAUGHAN

Jack C. Vaughan Appellant
MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

C L E R K ' S

C E R T I F I C A T E

I, HUBERT D. STEPHENS, JR., Clerk of the United States District Court for the Northern District of Mississippi, do hereby certify the foregoing six pages numbered 92-97, inclusive, and ten (10) lines of this page No. 98, contain a true and correct transcript of the following:

I. ORDER of March 6th, 1954, dismissing the action as to the remaining defendant, The First National Bank of Greenville, Mississippi.

II. NOTICE OF APPEAL. (Filed: March 31st, 1954)

III. DESIGNATION OF RECORD (Filed: March 31st, 1954)

IV. STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL. (Filed: March 31st, 1954).

in the cause entitled: Jack C. Vaughan vs. The First National Bank of Greenville, Mississippi and J. W. King, No. 120 of the Greenville Division Civil Action Docket of this Court.

~~1987~~
102

WITNESS my hand and Seal of said Court at Oxford, Mississippi, this the 21 day of April, A.D, 1954.

HUBERT D. STEPHENS, JR., CLERK

By: s/ IVADELL M. PTAK

Deputy Clerk

(S E A L)

~~1991~~ 103

Pages 104 through 140, being a portion of the record in the District Court requested by appellee, King, have been omitted from this record.

Said portion is believed by petitioner to have been erroneously included in the certified Transcript of Record prepared by the Clerk of the Court of Appeals.

That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:-

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JACK C. VAUGHAN, Appellant
vs. NO. 14,921
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING.

U.S.Court of Appeals
FILED Oakley F Dodd
Jan 28 1954 Clerk

MOTION FOR INTERMEDIATE ORDER GRANTING STAY
STAY OF PROCEEDINGS

Comes now the appellant, Jack C. Vaughan, and respectfully moves the Court as follows: to-wit

1.

That this Court grant a stay of all further proceedings regarding appeal taken on December 16, 1953 (R.70) from the Order of the District Court of the United States for the Northern District of Mississippi, rendered on November 19th, 1953, dismissing the action below as to the appellee, J. W. King.

2.

That such stay remain in effect until thirty (30) days after the rendition by said District Court of its Order dismissing the action as to the remaining defendant, The First National Bank of Greenville, Mississippi -- which Order of dismissal was requested by appellant on December 8, 1953 (Tr. 68), and which request has not been acted on, as far as appellant knows.

3.

That there be specifically included in such Order granting stay of proceedings, permission for appellant to hold in abeyance the service and filing of his designation of record and statement of points to be relied upon on appeal.

142.

In support of the foregoing, appellant shows that this

(End of page 142)

cause has been docketed under the provisions of Section 75(j) of the Federal Rules of Civil Procedure (R.71); that the final record has not been settled; that such stay is essential to prevent the needless delay and expense of preparation of two transcripts of record; and that the ends of justice will best be served if this Court be enabled to consider and dispose of the entire matter at one hearing.

Respectfully submitted,
s/ Jack C. Vaughan
JACK C. VAUGHAN, Appellant,
pro se.

MAILING ADDRESS:
P.O.Box 434
Main Post Office
St. Louis 3, Missouri

C E R T I F I C A T E

The undersigned, Jack C. Vaughan, certifies that he mailed a true copy of the above and foregoing MOTION FOR INTERMEDIATE ORDER GRANTING STAY OF PROCEEDINGS to Mr. R. V. Kimble, Jr., attorney for the appellee, J. W. King; mailing same postage prepaid, to the said Mr. Kimble, at his last stated address: 205-8 Weinberg Building, Greenville, Mississippi.

Mailed at Little Rock, Arkansas, this the 22nd day of January, A.D., 1954.

s/ Jack C. Vaughan

JACK C. VAUGHAN

ORDER DENYING MOTION OF APPELLANT FOR INTERMEDIATE ORDER GRANTING STAY OF PROCEEDINGS.

Extract from the Minutes of February 16, 1954.

JACK C. VAUGHAN

No. 14921. versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING.

IT IS ORDERED that the motion filed by appellant for intermediate order granting a stay of proceedings in this cause be, and the same is hereby, DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JACK C. VAUGHAN, Appellant
vs No. 14921
J. W. KING and THE FIRST NATIONAL BANK, GREENVILLE, MISSISSIPPI, Appellees

U.S.Court of Appeals
FILED Mar 23 1954
Oakley F. Dodd Clerk

MOTION TO DISMISS

NOW COMES J. W. King, one of the defendants and an appellee in the above styled and numbered cause, by his attorney R. V. Kimble, Jr., and moves this Court to dismiss the appeal of appellant, Jack C. Vaughan, as to the said J. W. King and for cause therefor shows:

1. That appellant, Jack C. Vaughan, has failed to file an appeal bond as required by Rule 10 of the Rules of the United States Court of Appeals for the Fifth Circuit wherein Rule 73(c) of the Federal Rules of Civil Procedure is adopted as the Rule of this Court.

2. That appellant, Jack C. Vaughan, has failed to file in the District Court of the United States for the Northern District of Mississippi a 'Designation of Contents of Record on Appeal' and a 'Statement of Points' as required by Rule 75(a) and 75(d) of said Federal Rules of Civil Procedure, said sections of said Rule 75 also having been adopted under the provisions of Rule 10 of the Rules of the United States Court of Appeals for the Fifth Circuit.

s/ R. V. KIMBEL, JR.

Attorney for J. W. King

C E R T I F I C A T E

I, R. V. Kimbel, Jr., of the firm of Harty and Kimbel, Greenville, Mississippi, attorneys for J. W. King of Greenville, Mississippi, the appellee in the above styled and numbered cause, do hereby certify that I have this day served a copy of the attached and foregoing motion to dismiss upon Jack C. Vaughan, appellant, by mailing to him, postage prepaid, a copy of said motion at his last given mailing address, to-wit: Mr. Jack C. Vaughan, 4440 Chef Monteur Highway, New Orleans 22, Louisiana.

This the 19th day of March, A. D. 1954.

s/ R. V. KIMBEL, JR.

Attorney for J. W. King

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.Court of Appeals
FILED Mar 25 1954
Oakley F Dodd, Clerk

JACK C. VAUGHAN, Appellant,
vs. NO. 14921
THE FIRST NATIONAL BANK OF GREENVILLE,
and J.W.KING, Appellees.

MOTION TO DISMISS APPEAL

TO THE COURT:

Now comes THE FIRST NATIONAL BANK OF GREENVILLE, one of the Appellees herein, by its attorney, W.C.Keady, and moves the Court to dismiss the appeal of JACK C. VAUGHAN, Appellant, as to the said Appellee, The First National Bank of Greenville, and for cause thereof shows as follows:

1.

While said cause was pending in the trial court, this Appellee, in accordance with its right under State law, filed a motion therein to require Plaintiff to provide security for court costs. Said motion was sustained by order of the District Court rendered November 24, 1953, a certified copy of said order being hereto attached. By the terms thereof, Jack C. Vaughan, as Plaintiff below, was required to give security for costs in the amount of $500.00 within sixty days from the order or suffer a dismissal of his complaint.

2.

The said Jack C. Vaughan having failed to comply with the order of the District Court by not providing security for costs within the said sixty day period of time or ever offering so to do, or by not showing cause why he should not

be required to post said security, the said District Court on proper notice and motion dismissed said complaint for the failure of the said Jack C. Vaughan to provide security for costs of court. Said order of

(End of page 147)

dismissal was entered March 6, 1954, a certified copy thereofbeing hereto attached.

3.

No final judgment or decree adjudicating the merits of the alleged controversy as between the said JACK C. VAUGHAN, Appellant, and this Appellee, THE FIRST NATIONAL BANK OF GREENVILLE, has been entered by the District Court. Therefore, the attempted appeal of the said Jack C. Vaughan, insofar as this Appellee is concerned, is untimely, improper, and should be dismissed.

s/ W.C.KEEDY

Attorney for The First National Bank of Greenville, 119 North Broadway, Greenville, Mississippi

I, W. C. Keedy, of Counsel for The First National Bank of Greenville, one of the Appellees in the above styled cause, do hereby certify that I have this day served a copy of the attached and foregoing motion to dismiss upon Jack C. Vaughan, Appellant, by mailing to him, postage prepaid, a copy of said motion at his last given mailing address, to-wit: Mr. Jack C. Vaughan, 4440 Chef Mentour Highway, New Orleans 22, Louisiana.

IN THE DISTRICT COURT OF THE UNITED STATES

NORTHERN DISTRICT OF MISSISSIPPI

GREENVILLE DIVISION

JACK C. VAUGHAN — PLAINTIFF

VS Civil Action No. 120

THE FIRST NATIONAL BANK OF GREENVILLE and J. W. KING — DEFENDANTS

ORDER REQUIRING SECURITY FOR COSTS

This cause having come on this day during the regular November term of this Court upon a motion of The First National Bank of Greenville, a defendant in the above styled cause, that Jack C. Vaughan, plaintiff, be required to give security for all costs of court accrued or to accrue in said action, and the Court having considered the motion, and the affidavit in support thereof, and being of the opinion that said motion is well taken;

It is hereby ordered, adjudged and decreed that Jack C. Vaughan, plaintiff, be and is hereby required to give security for costs in the amount of $500.00 to cover all costs accrued or to accrue in said action, and that unless said security for costs be made in the manner provided by law within sixty days from this date, said complaint shall be dismissed.

ORDERED, ADJUDGED and DECREED, this the 24 day of November, 1953.

s/ ALLEN COX

District Judge

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JACK C. VAUGHAN, PLAINTIFF
VS Civil Action No. 120
THE FIRST NATIONAL BANK OF GREENVILLE
and J. W. KING, DEFENDANTS

ORDER

This cause having come on to be heard upon the motion of THE FIRST NATIONAL BANK OF GREENVILLE to dismiss the complaint herein of JACK C. VAUGHAN for his failure to give security for costs pursuant to order entered in this cause under date of November 24, 1953, and it appearing that more than sixty days have elapsed from the date of the said prior order requiring costs and that Jack C. Vaughan, plaintiff, has failed to give security for costs in the manner provided by law or to show good cause why he should not be required to furnish such security, and it further appearing to the Court from the pleadings on file that Jack C. Vaughan, Plaintiff, does not propose to comply with the order of the Court regarding security for costs and that the motion of the First National Bank of Greenville is well taken and should be sustained:

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the complaint of Jack C. Vaughan be and the same is hereby dismissed as to The First National Bank of Greenville, one of the defendants in said action, for failure to provide security for costs.

ORDERED, ADJUDGED and DECREED, this 6th day of March, 1954

s/ ALLEN COX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.Court of Appeals
FILED Mar 26 1954
Oakley F. Dodd Clerk

JACK C. VAUGHAN, Appellant,
vs. NO. 14921
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING,
Appellees

MOTION TO STRIKE

Comes now the appellant, Jack C. Vaughan, and moves the Court to strike the Motion To Dismiss of the appellee, J. W. King, and for cause shows:

(1)

This action having been docketed, application for leave to file appeal bond is made this date in this appellate Court under the provisions of Rule 73(e) of the Federal Rules of Civil Procedure and filed herewith.(See Request For Waiver of Appeal Bond; And, In the Alternative, Application For Leave To Deposit Cash In Lieu Of Appeal Bond).

(2)

On January 4, 1954, under the provisions of Rule 75(j) of the Federal Rules of Civil Procedure, a certified transcript of portions of the record was filed in this Appellate Court. On January 21, 1954, this cause, No. 14,921, was docketed. On January 22nd, 1954, Motion For Intermediate Order Granting Stay Of Proceedings was made in this Appellate Court by appellant. On February 16, 1954, this Court entered Order denying said motion

(3)

Appellant, on February 22nd, 1954, then promptly filed a Statement Of Points Relied On By Plaintiff-Appellant and Appellant's Designation Of Record in the Appellate Court and served

(End of Page 151)

same upon appellees' attorneys. Appellant waited thirteen days (ten days plus three days mailing time) for appellee J. W. King to designate additional portions of the record, proceedings or evidence to be included; but no such designation was made.

(4)

Appellant then began preparation of the Record in accordance with Section 11 of Rule 23 of the RULES of this Court. On March 19, 1954, a mimeographed copy of the transcript consisting of 91 pages was mailed to the Clerk of the District Court of the United States, Northern District of Mississippi, for certification. Upon its return, duly certified, the original and copies of same will be bound by the printer, filed, and served upon appellees.

(5)

Said record presents all the facts upon which the District Court acted in granting appellee, J. W. King's motion to dismiss; and is sufficient to permit review of the judgment entered.

Respectfully submitted,
s/ JACK C. VAUGHAN
Jack C. Vaughan, Appellant

***

REQUEST FOR WAIVER OF APPEAL BOND;
AND, IN THE ALTERNATIVE, APPLICATION
FOR LEAVE TO DEPOSIT CASH IN LIEU OF APPEAL BOND

Appellant, Jack C. Vaughan, your petitioner, respectfully petitions the Court for Order waiving $250.00 appeal bond; and in lieu thereof allowing appellant to pay costs as they occur.

(1)

Petitioner is a citizen of the United States. Petitioner verily believes he has a meritorious appeal. Petitioner has heretofore paid all taxable costs and judicial fees required

(End Of Page 152)

of him in this cause, save printing costs of record, having elected to mimeograph same under the provisions of Section 11 of Rule 23 of the RULES of this Court.

(2)

Unless this Court orders otherwise by virtue of Rule 10 of its RULES, and Sections 73(c) and 73(e) of the Federal Rules of Civil Procedure, petitioner is required to execute bond of appeal in the sum of $250.00 as a condition of being allowed to prosecute this appeal.

(3)

Due to financial reverses occasioned in part by the wrongs of appellees, and the loss of his credit standing within the past three years; petitioner knows of no commercial bonding firm or individuals who would act as sureties. And in order to raise $250.00 cash at this time, appellant would

have to dispose of his remaining meager assets at great loss; which would work hardship on your petitioner in the pursuit of relief from the wrongs of appellees.

(4)

Petitioner shows that he is presently gainfully employed, and verily believes he is able to pay, out of current earnings, all foreseeable taxable costs in this appeal as they occur.

WHEREFORE your petitioner, Jack C. Vaughan, respectfully petitions this Court to waive the $250.00 appeal bond; allowing appellant to pay taxable costs in this appeal as they occur. In the alternative, this Honorable Court is requested to grant appellant not less than one hundred and twenty (120) days in which to raise $250.00 cash and deposit same with the Clerk in lieu of bond.

Respectfully submitted,
s/ JACK C. VAUGHAN
Jack C. Vaughan, Petitioner

(End Of Page 153)

A F F I D A V I T

STATE OF LOUISIANA }
PARISH OF ORLEANS } ss.

Before me the undersigned authority in and for the Parish and State aforesaid came and appeared Jack C. Vaughan, who having first been duly sworn made oath that he is the appellant in the above cause and that the matters contained in paragraphs (1), (3), and (4) of the above and foregoing Request For Waiver Of Appeal Bond; And, In The Alternative,

are true of his own personal knowledge or belief.

s/ JACK C. VAUGHAN
Jack C. Vaughan

SWORN TO AND SUBSCRIBED before me this the 23rd day of March, A.D., 1954.

s/ IRVIN S. SMITH
Notary Public

(S E A L)

My Commission Expires At Death

C E R T I F I C A T E

The undersigned Jack C. Vaughan, appellant herein, certifies that he served true copies of the above and foregoing MOTION TO STRIKE and REQUEST FOR WAIVER OF APPEAL BOND; AND, IN THE ALTERNATIVE, APPLICATION FOR LEAVE TO DEPOSIT CASH IN LIEU OF APPEAL BOND upon Mr. R. V. Kimble, Jr., attorney for the appellee J. W. King, by mailing same postage prepaid, in an envelope addressed to the said Mr. Kimble at his last stated address: 205-8 Weinberg Building, Greenville, Mississippi, and deposited in the United States Mails at New Orleans, Louisiana.

This the 24th day of March, A.D., 1954

s/ JACK C. VAUGHAN
Jack C. Vaughan, Appellant in propria persona,
MAILING ADDRESS:
4440 Chef Monteur Highway,
New Orleans 22, Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.Court of Appeals
FILED Mar 30 1954
Oakley F Dodd, Clerk

JACK C. VAUGHAN, Appellant,
vs. NO. 14921
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING,
Appellees.

MOTION TO STRIKE

Now comes the appellant, Jack C. Vaughan, and respectfully moves the Court to strike the Motion To Dismiss Appeal of the appellee, The First National Bank of Greenville, Mississippi, and for cause shows:

(NOTE: The reference: (Transcript, etc) refers to the page number of the CERTIFIED PORTION OF RECORD transmitted to this Appellate Court by the District Court Clerk, Northern District of Mississippi, on January 2nd, 1954).

1.

On November 19, 1953, ex parte, this action as to the defendant J. W. King was dismissed by the District Court (Transcript 63), and an allegedly void, according to plaintiff (Transcript 67), Final Decree of the Adams County, Mississippi, Chancery Court, No. 14,632 of the docket thereof, King vs. Vaughan, was sustained holding plaintiff, appellant herein, to be a Mississippi citizen (Transcript 24-26).

2.

On December 3rd, 1953 (too late for plaintiff to file motion for rehearing or new trial) plaintiff was notified of the entry of the above Order of November 19, 1953; and also of an Order Requiring Security For Costs ordered on November 24th, 1953 (Transcript 67).

Since the action of the District Court, by its Order of November 19 holding said Final Decree to be valid, was, in effect, a determination that plaintiff was a Mississippi citizen (as was de-

(End of Page 155)

fendant The First National Bank of Greenville, Mississippi, plaintiff felt that the District Court had, in effect, divested itself of jurisdiction of the cause for lack of diversity of citizenship (Transcript 67) and, under the circumstances, it would be useless for plaintiff to pursue the matter further in the District Court (Transcript 67). Accordingly, three days later, on December 7th, 1953 (Filed: December 8, 1953), plaintiff promptly filed notice of his election to stand upon the pleadings (Transcript 68), explained why he felt it useless to pursue the matter further (Transcript 67) and moved the District Court to dismiss the action as to the remaining defendant, The First National Bank of Greenville, in order for plaintiff to obtain a review of the proceedings by the Appellate Court (Transcript 68).

4.

On December 16th, 1953, appellant filed Notice Of Appeal from the Order of November 19th, 1953 dismissing as to King (Transcript 70).

5.

On January 21, 1954, the cause was docketed in the Ap-

pellate Court, No. 14,921, under Rule 75(j).

6.

On January 22, 1954, appellant filed Motion For Intermediate Order Granting Stay Of Proceedings in the Appellate Court.

7.

On February 16, 1954, the Appellate Court denied said Motion.

8.

On February 22, 1954, appellant filed in the Appellate Court and served both appellees Appellant's Designation Of Record (to include on portions of the CERTIFIED PORTION OF RECORD which had theretofore been transmitted to this Appellate Court by the Clerk of the District Court) and Statement Of Points Relied On By Plaintiff-Appellant. No designation of record was filed in the District

(End Of Page 156)

Court for the reason no further records there were needed by the appellant.

9.

Appellant waited thirteen days (ten days plus three days mailing time) for appellee J. W. King to designate additional portions of the record, proceedings or evidence to be included; but no such designation was made.

10.

Appellant then began preparation of the Record in accordance with Section 11 of Rule 23 of the RULES of this Court. On March 19th, 1954, a mimeographed copy of the Record, consist-

ing of 91 pages was mailed to the Clerk of the District Court of the United States, Northern District of Mississippi, for certification and return to appellant. Upon its return, duly certified, the original and copies of same will be bound by the printer, filed and served. In the meantime, on March 6th, 1954, the District Court rendered a final appealable ORDER as to the remaining defendant, dismissing the action as to The First National Bank of Greenville -- not upon the motion of plaintiff filed December 8, 1953 (Transcript 68); but upon the motion of the defendant, The First National Bank of Greenville, filed more than two months later. (See Order of March 6, 1954, referred to in par. 2 of appellee's Motion To Dismiss Appeal).

12.

On March 29, 1954, appellant served appellees, and mailed to the District Court for filing his Notice Of Appeal from the ORDER of the District Court of March 6, 1954; together with appellant's Designation Of Record and Statement Of Points To Be Relied Upon On Appeal, carbon copies of which are attached hereto.

13.

As shown by Point No. 4 of the attached Statement Of Points to Be Relied Upon On Appeal; upon plaintiff's motion to dismiss as to the remaining defendant, The First National Bank of Greenville, the District Court, under Rule 41(a)(2) of the Federal

Rules of Civil Procedure, should have then dismissed upon terms and conditions it deemed proper insofar as plaintiff's motion for dismissal was concerned. The District Court erred in ignoring plaintiff's motion; erred in waiting almost three months for another cause for dismissal, under Rule 41(b), to ripen; and erred in dismissing for the latter cause upon the remaining defendant's motion to dismiss.

14.

Due to the manner by which the District Court dismissed the action as to defendant J. W. King; then refused to dismiss as to defendant The First National Bank of Greenville; and due to the District Court Clerk's failure, under Rule 77(d), to comply with requests made upon him for notice of orders (Transcript 66-67); appellant has been prevented from making as orderly an appeal as would ordinarily have been made. But despite the difficulties, appellant verily believes he has substantially complied with the requirement of law and the RULES of this Court in getting this cause out of the trial court and into the Appellate Court for review.

s/ JACK C. VAUGHAN
Jack C. Vaughan, Appellant
MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

C E R T I F I C A T E

The undersigned, Jack C. Vaughan, appellant herein, certifies that he served a true copy of the above and foregoing MOTION TO STRIKE upon Mr. W. C. Keady, attorney for the appellee The First National Bank Of Greenville, Mississippi, by mailing same postage prepaid, in an envelope addressed to the

said Mr. Keady at his last stated address: 119 North Broadway, Greenville, Mississippi, and deposited in the United States Mails at Little Rock, Arkansas.

This 29th day of March, A.D., 1954.

s/ JACK C. VAUGHAN
Jack C. Vaughan Appellant
MAILING ADDRESS: P.O.Box 434, Main Post Office, St. Louis 3, Missouri.

(End Of Page 158)

IN THE DISTRICT COURT OF THE UNITED STATES
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

JACK C. VAUGHAN. . . . . .PLAINTIFF
vs. Civil - No. 120
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING. . . . . DEFENDANTS

NOTICE OF APPEAL

Notice hereby is given that Jack C. Vaughan, the plaintiff, herein, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the ORDER of this Court dismissing plaintiff's action as to the defendant, The First National Bank of Greenville; which said ORDER was ordered, adjudged and decreed on the 6th day of March, A.D., 1954.

This the 29th day of March, A.D., 1954.

s/ JACK C. VAUGHAN
Jack C. Vaughan, Plaintiff
MAILING ADDRESS:
P. O. Box 434,
Main Post Office,
St. Louis,

C E R T I F I C A T E

The undersigned, Jack C. Vaughan, plaintiff-appellant, certifies that he mailed a true copy of the above and foregoing NOTICE OF APPEAL to W. C. Keady, attorney for the defendant, The First National Bank of Greenville, Mississippi, mailing same postage prepaid, in an envelope addressed to the said Mr. Keady at his last stated address: 119 North Broadway, Greenville, Mississippi, and deposited in the United States Mails at Little Rock, Arkansas.

This the 29th day of March, A.D., 1954.

s/ JACK C. VAUGHAN
Jack C. Vaughan

(End Of Page 159)

(Caption Omitted)

DESIGNATION OF RECORD

TO THE CLERK OF THE DISTRICT COURT FOR
THE NORTHERN DISTRICT OF MISSISSIPPI:

Plaintiff-appellant, Jack C. Vaughan, herewith designates the following additional portions of the record and proceedings herein which he deems should be contained in the record on appeal of this cause to the United States Court of Appeals for the Fifth Circuit: to-wit

a. ORDER, dated March 6, 1954, dismissing the action as to the remaining defendant, The First National Bank of Greenville, Mississippi;

b. STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL, attached hereto;

c. This DESIGNATION OF RECORD.

Other certified portions of the record and proceedings have heretofore been forwarded by you, on January 2nd, 1954, to the Clerk of the above Court of Appeals and there filed and docketed in the cause, styled as above, No. 14,921, and designated by appellant in the appellate court to be contained in the printed or mimeographed record. Service of said designation was made upon appellees on February 22nd, 1954. You are requested to certify and transmit to the above

Court of Appeals the above matters: a, b and c; copies for comparison and certification being herewith furnished you

s/ JACK C. VAUGHAN
Jack C. Vaughan, plaintiff-appellant

MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

(End Of Page 160)

(Caption Omitted)

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

Appellant, Jack C. Vaughan, proposes on his appeal in the above styled cause to rely on the following points as error:

1.

The District Court erred in dismissing the action as to the defendant J. W. King on grounds that the complaint fails to state a cause of action.

2.

The District Court erred in holding that the decree of the Chancery Court of Adams County, Mississippi, in the cause No. 14,632, styled "J. W. King vs. Jack C. Vaughan" rendered on June 15th, 1953, was a just and valid decree. Said decree was void and a nullity as the said Chancery Court lacked jurisdiction.

3.

The District Court should have awarded summary judgment for plaintiff Vaughan against the defendants, The First National Bank of Greenville, Mississippi and J. W. King.

Upon plaintiff's motion to dismiss as to the remaining defendant, the District Court, under Rule 41(a)(2) of the Federal Rules of Civil Procedure, should have then dismissed upon terms and conditions it deemed proper insofar as plaintiff's motion for dismissal was concerned. The District Court erred in ignoring plaintiff's motion; erred in waiting almost three months for another cause for dismissal, under Rule 41(b), to ripen;

(End of Page 161)

and erred in dismissing for the latter cause upon the remaining defendant's motion to dismiss.

s/ JACK C. VAUGHAN
Jack C. Vaughan Appellant
MAILING ADDRESS:
Post Office Box 434,
Main Post Office,
St. Louis 3, Missouri

C E R T I F I C A T E

The undersigned Jack C. Vaughan, appellant herein, certifies that he served true copies of the above and foregoing DESIGNATION OF RECORD and STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL upon Mr. W. C. Keady, attorney for the appellee The First National Bank of Greenville, Mississippi, by mailing same postage prepaid, in an envelope addressed to the said Mr. Keady at his last stated address: 119 North Broadway, Greenville, Mississippi, and deposited in the United States Mails at Little Rock, Arkansas;

And the said Jack C. Vaughan further certifies that he served true copies of the above and foregoing DESIGNATION OF RECORD and STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL upon Mr. R. V. Kimble, Jr., attorney for the appellee J. W. King, by mailing same postage prepaid, in an envelope addressed to the said Mr. Kimble at his last stated address: 205-8 Weinberg Building, Greenville, Mississippi, and deposited in the United States Mails at Little Rock, Arkansas;

This the 29th day of March, A.D., 1954.

s/ JACK C. VAUGHAN
Jack C. Vaughan Appellant
MAILING ADDRESS: Post Office Box 434, Main Post Office, St. Louis 3, Missouri

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.Court Of Appeals
FILED May 3 1954
Oakley F. Dodd Clerk

JACK C. VAUGHAN, Appellant
vs No. 14,921
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING, Appellees.

MOTION OF APPELLANT TO STRIKE TRANSCRIPT OF RECORD REQUESTED OF THE DISTRICT CLERK BY APPELLEE, J. W. KING, AND FILED HEREIN.

Now comes the appellant, Jack C. Vaughan, and respectfully moves the Court to Strike and disregard the portions of the purported Transcript of Record requested by the appellee, J. W. King, and believed filed in this cause on or about April 21st or 23rd, 1954; and for cause appellant would show:

1.

That the Clerk of the District Court was without authority to transmit such an additional portion of purported transcript of Record.

2.

That more than two months ago, on February 22nd, 1954, the appellee, J. W. King, was given fair notice by appellant as to what portions of the Record appellant designated for inclusion in the Transcript, together with a statement of points to be relied upon on appeal. That no notice was thereafter given by appellee King to the appellant of any additional portions he wanted included until March 30, 1954, after appellant had completed mimeographing of the Transcript and mailed same to the District Clerk for Certification.

That there has now been designated by the appellee, King,

(End Of Page 163)

for inclusion, with other matters to which appellant objects by virtue of paragraphs 1 and 2, hereinabove, a certain

"A transcript of the Testimony Of Witnesses and of the Remarks of the Hon. Allen Cox, Judge, at the Hearing November 19, 1953".

Appellant respectfully shows that the purported Hearing of November 19, 1953, should be vacated; and all proceedings taken thereat and rights acquired by the Appellee J. W. King should be considered a nullity for want of prior notice to appellant and surprise:

a. Appellant shows that the Appellee, J. W. King, failed to give notice to Appellant that there was to be a hearing of his Motion To Dismiss.

b. Appellant shows that the only notice he had of any sort of hearing was sent him by FARISH, KEADY & CAMPBELL, who were not even attorneys of record of King -- and that so-called "notice", through no fault of Appellant, reached the Appellant after the hearing had been held.

c. Appellant shows that he wrote the Clerk on November 23, 1953, to advise him whether the Judge had made any disposition of the several (emphasis) motions before him; and the Clerk failed or refused to

do so until it was too late for Appellant to move for a new trial, and rectification of the mistake made by the Court on November 19, 1953 in dismissing the action as to King (Tr. 83-84).

d. That by reason of Appellee King's failure to give prior notice to Appellant of the hearing, the Honorable Judge of the District Court was permitted to err by holding a hearing, permitting the introduction of witnesses and testimony by Appellee King; and adjudicating the rights of appellant who was absent through no fault of his own. And by reason of the Clerk's failure to notify Appellant of entry of the Order of November 19, 1953 (3c, supra) appellant was denied his right to correct the error in the trial court.

In support of the foregoing, appellant attaches his affidavit, together with, photostatic copy of the telegram re-

(End Of Page 164)

ceived by appellant on November 19, 1953, from the purported Farish, Keady & Campbell.

WHEREFORE, appellant, Jack C. Vaughan, respectfully moves the Court to strike from the files and disregard as a complete nullity the above complained of transcript requested of the District Court Clerk by appellee J. W. King and filed herein on or about April 21st or April 23rd, 1954; and to vacate the Order of the District Court of November 19, 1953

(TR 81), together with all proceedings taken at the hearing held on the same date, and rights acquired thereunder by the Appellee, J. W. King.

Respectfully submitted,
s/ JACK C. VAUGHAN
Jack C. Vaughan Appellant
MAILING ADDRESS: Post Office Box 1005, Gardena, California.

C E R T I F I C A T E

The undersigned Jack C. Vaughan, appellant herein, hereby certifies that he served a true copy of the above and foregoing MOTION OF APPELLANT TO STRIKE TRANSCRIPT OF RECORD REQUESTED OF THE DISTRICT CLERK BY APPELLEE, J.W.KING, AND FILED HEREIN, together with AFFIDAVIT in support thereof, upon Mr. R. V. Kimble, Jr., attorney for the appellee J. W. King, by mailing same postage prepaid, in an envelope addressed to the said Mr. Kimble at his last stated address: 205-8 Weinberg Building, Greenville, Mississippi, and deposited in the United States Mails at Gardena, California.
This the 28 day of April, A. D., 1954.
s/ JACK C. VAUGHAN
Jack C. Vaughan Appellant
MAILING ADDRESS: Post Office Box 1005, Gardena, California

(End Of Page 165)

(Caption Omitted)

A F F I D A V I T

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss

Before me the undersigned authority in and for the State and County aforesaid came and appeared Jack C. Vaughan, who having first been duly sworn did state on oath that he is the appellant in the above styled and numbered cause; and that affiant did receive from Post Office Box 434, Main Post Office, St. Louis, Missouri, shortly after five o'clock in the afternoon of November 19th, 1953, the following Western

Union Telegram addressed to him, a true photostatic copy of both the telegram and envelope in which it was received being attached hereto: to-wit

1953 Nov 17 PM 1 29

NSA064 SSM218 NS.LLC264
(NS.GVA076) PD = GREENVILLE MISS 17 1100AMC =
JACK C. VAUGHAN=
MAIL PO BOX 1373 NRLNS (RTE NH) =

FEDERAL COURT WILL HEAR MOTION IN YOUR CASE VERSUS FIRST NATIONAL BANK AND KING THURSDAY NOVEMBER NINETEENTH AT NINE OCLOCK AM AT GREENVILLE =

FARISH KEADY AND CAMPBELL

Affiant further states that he had no other prior notice of a hearing or trial to be held on November 19th, 1953 in the cause: JACK C. VAUGHAN vs. THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING - No. 120-Civil-Greenville Division, in the District Court of the United States, Northern District of Mississippi; nor did he learn of entry of the Order of November 19th, 1953 in said cause dismissing the action as to the defendant, J. W. King, until December 3rd, 1953.

s/ JACK C. VAUGHAN

(End Of Page 166)

SWORN TO AND SUBSCRIBED before me, the undersigned Notary Public, this the 27 day of April, A. D., 1954.

(S E A L) s/ R. J. ALBRIGHT
Notary Public

My Commission Expires:
My Commission Expires November 26, 1956

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S.Court Of Appeals
FILED Jul 27 1954
Oakley F. Dodd Clerk

JACK C. VAUGHAN.....Appellant,
vs. No. 14,921
THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING,
Appellees.

NEWLY DISCOVERED MATTER IN SUPPORT OF MOTION OF APPELLANT TO STRIKE TRANSCRIPT OF RECORD REQUESTED OF THE DISTRICT CLERK BY APPELLEE J.W. KING AND FILED HEREIN.

TO THE HONORABLE THE CHIEF JUDGE AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

Comes the appellant, Jack C. Vaughan, and in further support of his previous motion to strike that portion of transcript of record filed herein by the appellee, J. W. King, (which motion to strike was served by appellant on appellee King's counsel on April 28, 1954) respectfully shows:

1.

That on the afternoon of July 22nd, 1954, appellant received through the United States Mails, P. O. Box 1005, Gardena, California, three (3) mimeographed copies of a purported PORTION OF TRANSCRIPT OF RECORD, REQUESTED BY APPELLEE KING in the above cause, and appellant thereby learned, for the first time, what appears to have actually transpired in the District Court below during the trial held on November 19, 1953 (R.81)(King's Record 12-34).

2.

Evidence is already before this Court that the appellant, through no fault of his own, received no prior notice of the

trial until after the trial had been held (See Motion of Appellant To Strike Transcript of Record Requested Of The District Court By Ap-

(End Of Page 168)

pellee J. W. King, And Filed Herein, at page two).

3.

That undisputed evidence is also before this Court that the District Court's Clerk, in violation of federal law (Rule 77(d) of The Federal Rules of Civil Procedure) failed or refused to serve a notice of entry of the Order of November 19, 1953 upon the appellant (TR. 83-84), who was not in default for failure to appear, until too late for the appellant to ask for a new trial or rehearing -- nor did the appellees serve a notice of such entry.

4.

That the transcript of Testimony In Open Court in the trial of November 19, 1953 (King's Record 12-34) shows on its face that the District Judge held trial on issues of fact of which appellant had no prior warning (one example - the issue of disputed identity), in denial of appellant's Constitutional right to jury trial, demand therefor having been duly made (R.9) in accordance with Rule 38(a),(b),(c) of the Federal Rules of Civil Procedure.

5.

That, as shown by the following, appellant verily believes that the District Judge was deliberately misled by

the appellees, who must have assured his Honor that the appellant had been given proper notice of the hearing by the appellees or the Clerk else he would not have asserted: "...counsel and the Court have made every effort possible to reach Mr. Vaughan at all addresses he has furnished counsel and the Court". The telegram (Exhibit to the above Motion To Strike) was not sent to appellant's home or business address: 4440 Chef Menteur Highway, New Orleans, Louisiana (TR.57), but to appellant's MAILING address. Had it been sent to the home or office address, Western Union would have been advised that the appellant was in St. Louis, and in a matter of minutes the telegram would have been there. Naturally, since it was addressed to a mailing address, Western Union put a three cent stamp on it and it became nothing more than a letter. Consequently, the provisions of Rule 6(e) of the Federal Rules of Civil Pro-

(End Of Page 169)

cedure were completely disregarded. It is not believed that the District Judge would have permitted the trial to be held on November 19th, 1953, had he been advised that the telegram had actually been sent by mail by the appellees.

6.

That had the appellant been given proper notice of the trial and made aware that a question of fact entirely alien to the suit was to be tried; and had there been a jury trial;

and had the appellant been given warning in time, and opportunity to prepare his defense to these new and damaging matters; the appellant would have presented to the jury a complete defense to every issue of purported fact raised at the trial, as shown by the appellee King's PORTION OF TRANSCRIPT as follows:

7.

In reply to the testimony of witness King, appellant would have shown:

a. That the appellant has never sued anyone by the name of Trunkline Gas Company or anyone else for $1,800,-000.00.

b. That the appellant has never filed any so-called "bankruptcy" proceedings.

c. That the appellant has never claimed Arkansas citizenship in any legal action or proceedings.

d. That appellant has no recollection whatever of having invited King to his home in Natchez, Mississippi, when appellant resided there.

Further, if it is true that the Witness, appellee King, has been previously convicted of mail fraud and served a term in the federal penitentiary therefor (R.49) his testimony could have been shown to be unworthy of credibility and subject to impeachment. Section 1692, Mississippi Code 1942, Annotated, Vol. 2, p. 406. Brister v. Dunaway, 149 Miss. 5; 115 So. 36; and certainly the

(End Of Page 170)

question of witness King's credibility was a matter which appellant would be entitled to have submitted to a jury. Fireman's Mutual Insurance Company v. Aponaug Mfg. Co., (5TH CCA) 149 F. 2d 359,363.

8.

In reply to the testimony of Witness Ferrell, appellant would have shown a jury

a. That the witness was incompetent. That he failed to state the exact time and date the purported attempted personal service of summons was made. That at line 16, page 23 of the Testimony, he swore: "...it was a late hour at night". Then at page 25 the same witness was asked:

"Q. (By Mr. Keady) What was the date that you went out there and attempted to serve the process, Mr. Ferrell?

"A. I couldn't say." He admitted incompetency.

After being rescued by counsel, he then stated:

"A. ...I don't want to be tied down to it, but I would say about six days later we went out there and Mr. Adair (Hebert, pronounced "a-bear") made alternate service".

Since the alternate service of process was made on April 25, 1953 (R.33), then piecing Ferrell's testimony together, the purported attempted service of process was supposed to

have been made at a late hour at night, on or about April 19, 1953.

Had the appellant received notice in time that this was to be an issue; appellant would have been able to have witnesses to show that at a late hour at night, on or about April 19, 1953, he was not even in the State of Mississippi, much less in Adams County.

b. Further, appellant would have been able to show a jury that the witness, Ferrell, was unworthy of credibility by the following testimony given by him on page 32 of King's PORTION OF TRANSCRIPT:

(End Of Page 171)

"Q. Did he (appellant) buy a 1953 license plate for his automobile?

"A. Yes, sir; he bought a 1953 Adams County, Mississippi, plate for his automobile".

Appellant, at a trial, would have been able to show that he DID NOT purchase a Mississippi automobile license for the year 1953. That the only automobile license appellant purchased for the year 1953 was a State of Louisiana License, No. 14-922.

WHEREFORE, appellant respectfully moves the Court that for want of proper notice of the trial; and by reason of surprise; and by reason of denial to appellant of his Constitutional right to trial by jury; and by reason of the District Court's adjudication of appellant's property rights in his

absence, and without due process; that the Honorable Court ORDER that the Portion Of Transcript Of Record, Requested By Appellee King be stricken from the files, and that this Court vacate the Order of the District Court of November 19, 1953 (TR 81), together with all proceedings taken at the hearing and rights acquired thereunder by the appellee J. W. King, and that this Court grant such other relief to the appellant as is by your Honors deemed appropriate.

Respectfully submitted,
s/ JACK C. VAUGHAN
Jack C. Vaughan, Appellant, in propria persona
MAILING ADDRESS: P.O.Box 1005, Gardena, California

C E R T I F I C A T E

I, Jack C. Vaughan, appellant in the above cause, do hereby certify that I have this day mailed a true copy of the above and foregoing Newly Discovered Matter In Support of Motion Of Appellant To Strike Transcript Of Record Requested Of The District Clerk By Appellee J. W. King and Filed Herein to Mr. W. C. Keady, 119 North Broadway, Greenville, Mississippi, attorney for the appellee The

(End Of Page 172)

First National Bank of Greenville, Mississippi, and a true copy was also this date mailed to Mr. R. V. Kimble, Jr., Post Office Box 335, Greenville, Mississippi, attorney for the appellee, J. W. King, which are the last given addresses of the above attorneys for the appellees known to the Appellant,

and which said true copies were mailed, postage prepaid, first class mail, air mail, in envelopes duly addressed to the said Messrs. Keady and Kimble, at the above stated addresses; and deposited in the United States Mails at the Gardena Post Office, Gardena, California.

This the 26 day of July, A.D., 1954.

s/ JACK C. VAUGHAN
Jack C. Vaughan, Appellant, in propria persona
MAILING ADDRESS: Post Office Box 1005, Gardena, California

ARGUMENT AND SUBMISSION

Extract from the Minutes of January 6, 1955.

JACK C. VAUGHAN,

No. 14921 versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING.

On this day this cause was called and after argument by Jack C. Vaughan, Esq., in propria persona, for appellant, and R. V. Kimble, Jr., Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT - FILED JANUARY 28, 1955

In The
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
****

No. 14,921
****

JACK C. VAUGHAN,
Appellant,

versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING,
Appellees.

****

(January 28, 1955)

Before HUTCHESON, Chief Judge, BORAH, Circuit Judge, and DAWKINS, District Judge.

HUTCHESON, Chief Judge: On June 1, 1953, plaintiff, suing on his own behalf and alleging himself to be a citizen of the State of Louisiana, and that defendants were citizens of Mississippi, brought this suit to recover of each and both defendants $183,542.55, alleged to have been lost by him as a result of their fraudulent and negligent

(End Of Page 175)

conduct as his agents in connection with the handling of certain farm lands in Chicot County, Arkansas, which appellant held under lease with an option to purchase.

Thereafter, motions were filed thick and fast,[1] and plaintiff's appeal is from orders entered on two of them. The first of these is the order of Nov. 19th, entered on King's motion filed July 21st, to dismiss the action as to him. The second is the order of March 6, 1954,[2] entered

---

1. These were:
(1) a motion for security for costs supported by affidavit filed July 8th by the bank and July 9th by King;
(2) a motion to dismiss on the grounds that, as shown by the attached decree rendered June 15th, 1953, in the Chancery Court of Adams County, Miss., in cause No. 14632, J. W. King vs. Jack C. Vaughan, (a) that plaintiff was a citizen of Mississippi and the requisite diversity of citizenship was therefore lacking; and (b) the complaint failed to state a claim entitling plaintiff to relief filed July 18th by the bank and July 21st by King;
(3) a motion filed by plaintiff July 27, 1953, to disregard the effect of the unjust decree relied on by defendants;
(4) a motion for summary judgment on the complaint and the affidavit of plaintiff with exhibits attached;
(5) a motion filed by plaintiff Dec. 8, 1953, for an extension of time to appeal from an order entered Nov. 19th, dismissing on King's motion, plaintiff's suit as to him;
(6) a motion supported by affidavit, filed by plaintiff on Dec. 8, 1953, after receiving notice of the orders of Nov. 19th dismissing the action against King and of the order of Nov. 24, 1953, respectively, requiring security for costs, in and by which plaintiff declared the election to stand upon the pleadings filed by him and suffer judgment of dismissal as to the defendant First National Bank in order to present for review by the appellate courts the proceedings in this cause and moved the court to direct the entry of an order dismissing the cause as to the bank.

2. "This cause having come on to be heard upon the motion of The First National Bank of Greenville to dismiss the complaint herein of Jack C. Vaughan for his failure to give security for costs pursuant to order entered in this cause under date of November 24, 1953, and it appearing that more than sixty days have elapsed from the date of the said prior order requiring costs and that Jack C. Vaughan, plaintiff, has failed to give security for costs in the manner provided by law or to show good cause why he should not be required to furnish such security, and it further appearing to the court from the pleadings on file that Jack C. Vaughan, plaintiff,

on the bank's motion to dismiss the suit for plaintiff's failure to furnish security for costs.

Here complaining of the November 19th order, to the extent that the order was based upon the finding that the Adams County decree "is res judicata as to all matters complained of as against King"; that the hearing was had and the judgment entered without notice to him, without adequate pleading and proof to support it, and without any basis in law or fact, appellant insists that the judgment of dismissal was erroneous and may not stand.

His complaints of the order dismissing the cause as to the bank are: (1) that he had no notice of the order of November 24, 1953, requiring him to give security for costs until Dec. 3, 1953, and (2) that, on December 8th, he filed notice of his election to stand upon his pleadings and moved the court to dismiss the cause as to the bank in order that he might appeal. Based on these complaints, he insists that the court erred when, on March 6, 1954, instead of dismissing the action on plaintiff's motion, it dismissed on the bank's motion for security for costs.

---

does not propose to comply with the order of the court regarding security for costs and that the motion of The First National Bank of Greenville is well taken and should be sustained:

"IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the complaint of Jack C. Vaughan be, and the same is hereby, dismissed as to The First National Bank of Greenville, one of the defendants in said action, for failure to provide security for costs."

We agree with appellant that the record affords no basis for the conclusion of the district judge that the Adams County decree is res judicata of all matters alleged in plaintiff's suit, and that it should be dismissed on that ground.

But this is not to say that the judgment of dismissal as to King is erroneous and may not stand. For we think it clear that though the reasons assigned by the district judge for his action in dismissing the suit will not sup-

(End Of Page 177)

port it, the dismissal was proper for another reason. This is that, search the complaint as one may, while it does contain an allegation that plaintiff was deprived of the use and occupancy of the Florence Plantation by the fraudulent and negligent acts of the bank, King, and others, no facts are, indeed not a single fact is, alleged which will support a claim of wrongdoing on King's part or show how anything that he did could have caused any of the damages and losses sued for.

Matters standing thus on plaintiff's pleadings and the record showing that plaintiff repeatedly declared both before and after the order dismissing the suit as to King that he would stand upon his pleadings and suffer judgment if they did not entitle him to recover, the order of the district judge dismissing plaintiff's action as to King is affirmed, though not for the reason that the Adams County Judgment is

res judicata.

When it comes to the order dismissing the suit as to the bank, we think it too plain for discussion that on this record, the district judge had no alternative. His order requiring security for costs had been for months ignored, if not defied. If, however, we should accept appellant's suggestion that he had the alternative of dismissing the action on plaintiff's motion, plaintiff would stand no better here. For, as we have pointed out in the opinion this day filed in Vaughan v. City Bank, plaintiff could not have complained of a dismissal on his own motion since on the plainest principles he was not entitled to a summary judgment on his pleadings and a dismissal for want of prosecution was demanded.

(End Of Page 178)

The judgments appealed from are AFFIRMED.

JUDGMENT.

Extract from the Minutes of January 28, 1955.

JACK C. VAUGHAN,

No. 14921. versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, Jack C. Vaughan, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

No. 14921

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

JACK C. VAUGHAN,

Appellant,

vs.

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING,

Appellees.

Appeal From the United States District Court for the Northern District of Mississippi.

PETITION FOR REHEARING.

To the Honorable Joseph C. Hutcheson, Chief Judge, and the Honorable Wayne G. Borah, Circuit Judge, and the Honorable Ben C. Dawkins, District Judge, of the United States Court of Appeals for the Fifth Circuit.

Comes now the appellant, Jack C. Vaughan, and presents this, his petition for rehearing of the above entitled cause; and respectfully calls the attention of the Court to the following matters of law and fact believed inadvertently overlooked by the Court as shown by its Opinion of January 28, 1955.

U. S. Court of Appeals
FILED Feb 14 1955
John A. Feehan, Jr.,
Clerk

I.

The ". . . motion for security for costs . . . filed July 8th by the bank and July 9th by King . . ." were, appellant believes, *absolutely prohibited* by Federal Statute. The motions were filed *prior to their responsive pleadings,* which were overdue. Motions for security for costs are not listed among the *only* types of motions permitted by *Rule 12(b) of the Federal Rules of Civil Procedure, 28 USCA* to be filed prior to a pleading. Therefore, any orders of dismissal based upon such "motions" are, appellant believes, complete nullities as a matter of Federal Law.

II.

By the ". . . motion to dismiss on the grounds that, as shown by the attached decree rendered June 15, 1953, in the Chancery Court of Adams County, Miss., in cause No. 14362, *J. W. King v. Jack C. Vaughan,* (a) that plaintiff was a citizen of Mississippi and the requisite diversity of citizenship was therefore lacking; and (b) the complaint failed to state a claim entitling plaintiff to relief filed July 18th by the bank and July 21st by King . . .", *matters outside the pleading (were) presented to and not excluded by the Court.* This was despite plaintiff's ". . . motion filed by plaintiff July 27, 1953, to disregard the effect of the unjust decree relied on by defendants . . ." Therefore, under Rule 12(b) of the *Federal Rules of Civil Procedure,* 28 USCA, the motions to dismiss were actually *motions for summary judgment,* and should have been disposed of as provided by Rule 56 of the *Federal Rules of Civil Procedure,* 28 USCA. This the District Court refused to do in regard to the bank; although it upheld King *who had filed absolutely identical pleadings.*

III.

The ". . . motion for summary judgment on the complaint and the affidavit of plaintiff with exhibits attached . . .", being *unopposed* by defendants, should have either been granted plaintiff; or else the District Court was *required,* under Rule 56 of the *Federal Rules of Civil Procedure* ". . . *to make an order specifying the facts that appear without substantial controversy,* including the extent to which the amount of damages or other relief is not in controversy . . ." (Emphasis added.) Appellant respectfully submits that if the District Court had complied with Rule 56, from the pleadings, affidavits and depositions on file, *it would have been forced to specify that* ALL *of the facts alleged by plaintiff were without controversy.* Therefore, plaintiff was, and, appellant respectfully submits, still is entitled to summary judgment against defendants as a matter of Federal Law.

IV.

Defendant King's motion to dismiss the complaint having been sustained, and the complaint dismissed as to him [R. 81], plaintiff properly announced his election to stand upon the pleadings, moving the Court for a final order or judgment dismissing the action as to the remaining defendant bank, in order to appeal [R. 85-86]. (*Dye v. Farm Mortgage Investment Co.* (10th C. C. A.) 70 F. 2d 514; *Crutcher v. Joyce* (10th C. C. A.) 134 F. 2d 809; *Asher v. Ruppa* (7th C. C. A.) 173 F. 2d 10.) The District Court erred in ignoring plaintiff's motion to dismiss as to the defendant bank; erred in waiting almost three months for another cause for dismissal (failure to provide security for costs) to ripen; and erred in dis-

missing for the latter cause upon the defendant bank's motion [R. 92]. (*Cone v. West Virginia Paper Company*, 330 U. S. at p. 217; 67 S. Ct. 752; 91 L. Ed. 849.)

Wherefore, upon the foregoing grounds, it is respectfully urged by appellant that this petition for rehearing be granted; that the Orders of the District Court appealed from be reversed; and that summary judgment in the amount of $183,542.55, together with interest and costs, be awarded appellant Jack C. Vaughan against the appellees First National Bank of Greenville, Mississippi and J. W. King.

Respectfully submitted,

JACK C. VAUGHAN,
Appellant in propria persona.
Post Office Box 1005,
Gardena, California.

Certificate.

I, Jack C. Vaughan, appellant in the above cause, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay, and is verily believed to be meritorious.

s/ JACK C. VAUGHAN,
JACK C. VAUGHAN,

Certificate of Service.

The undersigned, Jack C. Vaughan, appellant in the above cause, does hereby certify that he did serve true copies of the above and foregoing petition for rehearing upon the appellees by mailing same, postage prepaid, First Class Mail, in envelopes addressed to counsel for same at their last known address, to-wit: Mr. R. V. Kimble, Jr., Post Office Box 335, Greenville, Mississippi (Counsel for Appellee J. W. King); and Mr. W. C. Keady, 119 No. Broadway, Greenville, Mississippi (Counsel for Appellee The First National Bank of Greenville, Mississippi) and deposited in the United States Mails by the undersigned at the United States Post Office....., Gardena, California, on the 12 day of February, 1955.

s/ JACK C. VAUGHAN,
JACK C. VAUGHAN,
Appellant.

MAILING ADDRESS:
Post Office Box 1005,
Gardena, California.

ORDER DENYING REHEARING

Extract from the Minutes of March 17, 1955

JACK C. VAUGHAN

No. 14921 versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI, and J. W. KING.

It is Ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

CLERK'S CERTIFICATE.
UNITED STATES OF AMERICA.
UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT.

I, John A. Feehan, Jr., Clerk of the United States Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 141 to 186, next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 14921, wherein Jack C. Vaughan, is appellant, and The First National Bank of Greenville, Mississippi, and J. W. King, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the mimeographed record, supplemental record and portion of transcript of record requested by appellee King numbered from 1 to 140 are identical with the mimeographed record, supplemental record and portion of transcript of record requested by appellee King upon which said cause was heard and decided in the said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Court of Appeals at my office in the City of New Orleans, Louisiana, in the Fifth Circuit this 13th day of April, A.D., 1955.

(S E A L)

s/ JOHN A FEEHAN, JR.,
Clerk, United States Court of Appeals for the Fifth Circuit.

SUBJECT INDEX

		Page
CAPTION.		1
I.	OPINIONS OF THE COURTS BELOW	1
II.	GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED. .	2
III.	THE QUESTIONS PRESENTED FOR REVIEW	3
IV.	CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.	7
V.	STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED. . . .	11
VI.	ARGUMENT	
	A. If a state court decree is void for want of jurisdiction; then should not an ORDER of the district court, based upon it being res judicata, and the JUDGMENT of the court of appeals sustaining the ORDER of the district court, also be considered legal nullities?.	27
	B. Since plaintiff, by virtue of the failure of the clerk to comply with Rule 77(d), was now prohibited by Rule 59(b) of the Federal Rules of Civil Procedure, 28 USCA, from moving the district court for a new trial; did he not -- in accordance with the decisions of the Courts of Appeals for the Seventh and Tenth Circuits -- properly announce his election to stand upon the pleadings and record, and move the district court for a final order or judgment of dismissal in order to appeal?	28
	C. Upon plaintiff's motion for dismissal as to the remaining defendant on December 8, 1953; should not the district court have dismissed upon such terms and conditions as the court deemed proper, instead of waiting until March 6, 1954, for grounds of failure to obey a court order requiring security for costs to ripen; then dismissing on the latter grounds upon motion of the remaining defendant?.	28
	D. Does a federal district court have the power to permit a motion to be filed prior to a responsive pleading, other than one of the seven (7) types of motions permitted by Rule 12(b) of the Federal Rules of Civil Procedure?	31

SUBJECT INDEX

CAPTION . . . . . Page

I. CITATIONS OF THE COURTS BELOW 1

II. GROUNDS ON WHICH JURISDICTION OF COURT IS INVOKED 1

III. THE QUESTIONS PRESENTED FOR REVIEW 2

IV. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

V. STATEMENT OF THE CASE DISCLOSING THE FACTS RELIED ON TO SUSTAIN THE GRANTING OF THE WRIT 11

VI. ARGUMENT 27

A. 27

B. 29

C. 38

D. 39

E. Should not whether a so-called "Motion To Dismiss" is a "motion" or a "pleading" be determined not by the designation given it by the defendants, but by the contents of the instrument itself?. 32

F. Since a cross-claim is a responsive pleading, and since res judicata is an affirmative defense, and under Rule 8(c) of the Federal Rules of Civil Procedure "shall" be asserted in a responsive pleading; should not so-called "motions to dismiss" of defendants, which set forth affirmatively a cross-claim for $6,250.00, and res judicata as a complete defense to the entire action and a bar on the merits be treated as responsive pleadings rather than motions to dismiss --, and, therefore, motions for judgment on the pleadings under Rule 12(c) and 56 of the Federal Rules of Civil Procedure? 32

G. Plaintiff's motion for summary judgment on the complaint, responsive pleadings, depositions, together with affidavits and exhibits, being unopposed and uncontroverted by defendants; is not the district court required, by Rules 56(c)(d) of the Federal Rules of Civil Procedure, to:

1. Either grant the motion; or
2. Make an order specifying that all of the allegations of the complaint are admitted by the defendants?. 33

H. Where there are no issues remaining to be tried; if the complaint states a claim entitling plaintiff to some relief; should not the district court forthwith enter an order granting plaintiff summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure?. 33

CONCLUSION 38

AFFIDAVIT OF SERVICE 39

TABLE OF CASES

Anderson v. Yungkau, et al.
329 U. S. 482,485; 67 S.Ct. 428; 91 L.Ed. 436. 29,37

Asher v. Ruppa (7TH CCA) 173 F. 2d 10. 4,26,30

Baker v. Sisk, 1 F.R.D. 232,236. 34

Campbell v. Duncan, 84 F. Supp. 732. 18

Cone v. West Virginia Paper Company
330 U.S. 217; 67 S.Ct. 752; 91 L.Ed. 849 5,26,30

Cooper v. Newell
173 U.S. 555; 19 S.Ct. 506; 43 L.Ed. 808 28

Crutcher v. Joyce (10TH CCA) 134 F. 2d 809 4,26,30

Dye v. Farm Mortgage Investment Co. (10TH CCA)
134 F. 2d 514. 4,26,30

Eberle v. Sinclair Prairie Oil Co., 35 F. Supp. 296. 35

Goldey v. Morning News
156 U.S. 518,521; 15 S.Ct. 559; 39 L.Ed. 517 27

Griffin v. Griffin
327 U.S. 220,225; 37

Jones v. Miller, 2 F.R.D. 479 35

Kerno-Smith Co. v. School Dist. of Scranton
44 F. Supp. 711. 32

King v. Vaughan, #14632, Adams Co. Chan. Ct.,
Miss.. 12,13,21,22,24,28,30,33

Stoddard v. Morrin, 8 F.R.D. 375 35

Umbarger v. Tower (La.) 131 So. at page 510. 27

United States ex rel v. Thoman
156 U.S. 353,360; 15 S.Ct. 378; 39 L.Ed. 450 29,30

Vaughan v. Branson, #7894,Chicot Co.,Ark.,Chan.Ct. 18

Vaughan v. First Nat'l Bank, et al
218 F. 2d. 804 1,11,12,23,25,36

STATUTES

Title 28, U.S.C.A., Section 1254(1). 2

" " " " " Section 2101(c). 2

" " " " " , Federal Rules of Civil Procedure

Rule 1 7,32

Rule 5(a) 7
Rule 5(b) 7
Rule 6(b) 7,24
Rule 7(a) 7,35
Rule 8(c) 6,7,32,35
Rule 8(d) 8,35
Rule 12(a). 8,30,32
Rule 12(b). 5,8,25,30,32,35,38
Rule 12(c). 6,8,33,35,38
Rule 12(h). 8
Rule 41(a)(1) 5
Rule 41(a)(2) 5,9,24
Rule 41(b). 24
Rule 56 6,25,33,35,37,38
Rule 56(a). 9
Rule 56(c). 6,9,33,37
Rule 56(d). 6,9,33,37,38
Rule 59(b). 4,9,29
Rule 77(d). 4,9,28,29
Rule 83 10,32

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1954

No._____

JACK C. VAUGHAN,
Petitioner,

versus

THE FIRST NATIONAL BANK OF GREENVILLE, MISSISSIPPI,
and J. W. KING,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To The Honorable, The Chief Justice And The
Associate Justices Of The Supreme Court Of The United States:

Petitioner, Jack C. Vaughan, plaintiff in the United States District Court for the Northern District of Mississippi, and appellant in the United States Court of Appeals for the Fifth Circuit, below, respectfully shows:

I.
OPINIONS OF THE COURTS BELOW.

No opinions were rendered by the District Court in connection with its ORDERS of November 19, 1953 (TR.81, and Footnote (8), post), and March 6, 1954 (TR. 96-97, & Footnote (10), post), dismissing the action.

The OPINION of the United States Court of Appeals for the Fifth Circuit, rendered on January 28, 1955, is officially reported at 218 F. 2d. 804. Petition for rehearing was denied by ORDER(1) entered March 17, 1955. No opinion was rendered.

---

(1) "It is ordered by the Court that the petition for rehearing filed in this cause be, and same is hereby, denied (R.186)".

II.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A. The JUDGMENT of the Court of Appeals was entered on January 28, 1955(2). Petitioner seeks review of the JUDGMENT and the Order of the Court of Appeals denying petition for rehearing.

B. The Statutory provisions believed to confer on this Court jurisdiction to review the judgments in question by writ of certiorari are Title 28, USCA, Sections 1254(1)(3), and 2101(c)(4). A justice of the Supreme Court extended time for filing petition for writ of certiorari for a period not exceeding 60 days.

C. Petitioner believes that jurisdiction of this Court should be invoked to secure uniformity of decision between the Court of Appeals for the Fifth Circuit and other Courts of Appeals and this Court; and to decide federal questions of importance which it is in the public interest to have decided by this Court of last resort.

---

(2) "This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Mississippi, and was argued by counsel;

"On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in this cause be, and the same are hereby, affirmed;

"It is further ordered and adjudged that the appellant, Jack C. Vaughan, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court (TR 180)".

(3) Pertinent portions: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil...case, before or after rendition of judgment or decree;".

(4) Pertinent portions: "...(c)...any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days".

Petitioner believes that the United States Court of Appeals for the Fifth Circuit has:

1. Rendered a decision in conflict with the decisions of the Courts of Appeals for the Seventh and Tenth Circuits on the same matter;

2. Rendered a decision not in accordance with the applicable decisions of this Court;

3. Decided important questions of Federal Law which have not been, but should be, settled by this Court; and

4. Sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to be a major concern to the integrity of the federal judicial process, and demands the exercise of this Court's powers of supervision.

III.
THE QUESTIONS PRESENTED FOR REVIEW

A. If a state court decree is void for want of jurisdiction; then should not an ORDER of the district court, based upon it being res judicata, and the JUDGMENT of the court of appeals sustaining the ORDER of the district court, also be considered legal nullities?

B. Two Mississippi defendants filed identical so-called "Motions To Dismiss" (actually responsive pleadings and motions for judgment on the pleadings and summary judgment). Their "motions"

were based upon an allegedly void state court decree (which they had obtained fifteen days after the institution of this suit against them in the federal court). The state court decree awarded defendants judgment on all matters complained of in the federal suit against them, awarded them a $6,250.00 claim against the plaintiff in the federal suit, and adjudged the plaintiff in the federal suit to be a Mississippi citizen, also (in which case the federal court would lack jurisdiction). On November 19, 1953, the "motion" of one of the defendants was "tried" by counsel of the other defendant during plaintiff's absence ---- some several hundred miles distant. Plaintiff was given no prior notice of the "trial", and in his absence the federal district court held that the state court decree was valid and therefore res judicata. The ORDER of dismissal of November 19, dismissing as to one of the two defendants, was witheld from the knowledge of the plaintiff by the federal district court clerk for fourteen days after entry of the ORDER. QUESTION: Since Plaintiff, by virtue of the failure of the clerk to comply with Rule 77(d), was now prohibited by Rule 59(b) of the Federal Rules of Civil Procedure, 28 USCA, from moving the district court for a new trial; did he not -- in accordance with the decisions of the Courts of Appeals for the Seventh and Tenth Circuits (Dye v. Farm Mortgage Investment Co. (10TH CCA) 70 F. 2d 514; Crutcher v. Joyce (10TH CCA) 134 F. 2d 809; Asher v. Ruppa (7TH CCA) 173 F. 2d 10), properly announce his election to stand upon the pleadings and record, and move the district court for a final order or judgment of dismissal as to the remaining defendant in order to appeal? The Court of Appeals

for the Fifth Circuit, by sustaining the District Court, which refused to grant the plaintiff's requested Order of dismissal upon terms, in effect, says, "No".

C. This Supreme Court has held that: "Rule 41(a)(1) preserves the unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. Rule 41(a)(2) still permits a trial court to dismiss without prejudice 'upon such terms and conditions as the Court deems proper'." Cone v. West Virginia Paper Company, 330 U.S. at page 217; 67 S.Ct. 752; 91 L.Ed. 849. QUESTION: Upon Plaintiff's motion for dismissal as to the remaining defendant on December 8, 1953; should not the district court have dismissed upon such terms and conditions as the Court deemed proper; instead of waiting until March 6, 1954, for grounds of failure to obey a court order requiring security for costs to ripen; then dismissing on the latter grounds upon motion of the remaining defendant?

D. Does a federal district court have the power to permit a motion to be filed prior to a responsive pleading, other than one of the seven (7) types of motions permitted by Rule 12(b) of the Federal Rules of Civil Procedure, 28 USCA?

E. Should not whether a so-called "Motion To Dismiss" is a "motion" or "pleading" be determined not by the designation given it by the defendants but by the contents of the instrument?

F. Since a cross-claim is a responsive pleading, and since res judicata is an affirmative defense, and under Rule 8(c) of the Federal Rules of Civil Procedure "shall" be asserted in a responsive pleading; should not so-called "motions to dismiss" of defendants, which set forth affirmatively a cross-claim for $6,250.00, and res judicata as a complete defense to the entire action and a bar on the merits be treated as responsive pleadings rather than motions to dismiss --- and, therefore, motions for judgment on the pleadings under Rules 12(c) and 56 of the Federal Rules of Civil Procedure?

G. Plaintiff's motion for summary judgment on the complaint, responsive pleadings, depositions and admissions, together with affidavits and exhibits, being unopposed and uncontroverted by defendants; is not the district court required, by Rule 56(c)(d) of the Federal Rules of Civil Procedure to:

1. Either grant the motion for summary judgment; or
2. Make an order specifying that all of the allegations of the complaint were admitted by the defendants?

H. Where there are no issues remaining to be tried; if the complaint states a claim entitling plaintiff to some relief; should not the district court forthwith enter an order granting plaintiff summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure?

IV.
CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

A. Rule 1, F.R.C.P., 28 USCA: "SCOPE OF RULES".

"These rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable at law or in equity.... They shall be construed to secure the just, speedy and inexpensive determination of every action".
Title 28, U.S.C.A., "Rules 1 To 16", p. 167

B. Rule 5, F.R.C.P., 28 USCA: "SERVICE...OF PLEADINGS, ETC."

"(a) Service, When Required. ....every pleading subsequent to the original complaint....shall be served upon each of the parties affected thereby..."
"(b) Same; How Made. Whenever under these rules service is required...service shall be made....upon a party....by delivering a copy to him or by mailing it to his last known address...Service by mail is complete upon mailing".
Title 28, U.S.C.A., "Rules 1 to 16", pp 228-229.

C. Rule 6, F.R.C.P., 28 USCA: "TIME"

"(b) Enlargement. When by these rules....an act is required to be done at or within a specified time, the Court for cause shown may...upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule...59(b),(d) and (e)...".
Title 28, U.S.C.A., "Rules 1 To 16", p. 232.

D. Rule 7, F.R.C.P., 28 USCA: "PLEADINGS ALLOWED, ETC."

"(a) Pleadings. There shall be a complaint and an answer; and there shall be...an answer to a cross-claim, if the answer contains a cross-claim...No other pleadings shall be allowed...".
Title 28, U.S.C.A., "Rules 1 To 16", p. 245.

E. Rule 8, F.R.C.P., 28 USCA: "GENERAL RULES OF PLEADING".

"(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively....res judicata...and any other matter constituting an avoidance

or affirmative defense...".

"(d) Effect Of Failure To Deny. Averments in a pleading to which a responsive pleading is required...are admitted when not denied in the responsive pleading".

Title 28 U.S.C.A., "Rules 1 To 16", p 252.

F. Rule 12, F.R.C.P., 28 USCA: "DEFENSES AND OBJECTIONS - WHEN AND HOW PRESENTED - BY PLEADING OR MOTION...".

"(a) When Presented. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him... A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him".

"(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading - whether a claim... (or)...cross-claim...shall be asserted in the responsive pleading thereto...except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter
(2) lack of jurisdiction over the person
(3) improper venue
(4) insufficiency of process
(5) insufficiency of service of process
(6) failure to state a claim upon which relief can be granted
(7) failure to join an indispensable party...".

"...If on motion asserting the defense numbered (6) to dismiss for failure of the (complaint) to state a claim upon which relief can be granted, matters outside the (complaint) are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56".

"(c) Motion For Judgment On The Pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings. If on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

"(h) Waiver Of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or, if he has made no motion, in his answer or reply...".

Title 28, U.S.C.A., "Rules 1 to 16", p. 334.

or affirmative defenses...".

"(d) Effect Of Failure To Deny. Averments in a pleading to which a responsive pleading is required...are admitted when not denied in the responsive pleading".

Title 28 U.S.C.A., "Rules 1 to 16", p. [illegible]

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(2) lack of jurisdiction over the parties
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"(h) Waiver Of Defenses. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided, or, if he has made no motion, in his answer or reply...".

Title 28, U.S.C.A., "Rules 1 to 16", p. [illegible]

G. Rule 41, F.R.C.P., 28 USCA: "DISMISSAL OF ACTIONS".

"(a) Voluntary Dismissal; Effect Thereof.

(2) By Order Of Court. ...an action shall.....be dismissed at the plaintiff's instance.....upon such terms and conditions as the Court deems proper.".
Title 28, U.S.C.A., "Rules 17 to 51" p.379.

H. Rule 56, F.R.C.P., 28 USCA: "SUMMARY JUDGMENT"

"(a) For Claimant. A party seeking to recover upon a claim ...may at any time after the expiration of 20 days from the commencement of the action.....move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof".

"(c) Motion And Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing...The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law...".

"(d) Case Not Fully Adjudicated On Motion. If on motion under this rule judgment is not rendered...for...the relief asked...the court shall ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy.....the facts so specified shall be deemed established...".
Title 28, U.S.C.A., "Rules 52 to End", p.153.

I. Rule 59, F.R.C.P., 28 USCA: "NEW TRIALS".

"(b) Time For Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment..."
Title 28, U.S.C.A., "Rules 52 To End", p.269.

J. Rule 77, F.R.C.P., 28 USCA: "DISTRICT COURTS AND CLERKS".

"(d) Notice Of Orders Or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby...".
Title 28, U.S.C.A., "Rules 52 To End", p.472.

K. Rule 83, F.R.C.P., 28 USCA: "RULES BY DISTRICT COURTS".

Each district court...may...make an amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by Rule, the district courts may regulate their practice in any manner not inconsistent with these Rules".

Title 28, U.S.C.A., "Rules 52 To End", p. 504 .

V.
STATEMENT OF THE CASE CONTAINING THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED.

A. Basis For Federal Jurisdiction In The Court Of First Instance.

Petitioner, Jack C. Vaughan, plaintiff in the district court, and appellant in the court of appeals, filed suit in the United States District Court for the Northern District of Mississippi on June 1st, 1953 (TR.1). The complaint alleged the plaintiff to be a citizen of Louisiana and the defendants to be citizens of Mississippi (TR.1-2). The matter in controversy was alleged to exceed $3,000.00, exclusive of interest and costs (TR.2). Personal service of the summons and complaint was obtained upon the defendant J. W. King, on June 3rd, 1953; and upon the defendant, The First National Bank of Greenville, Mississippi, on June 4th, 1953, by Deputy United States Marshal (TR.29-30), at Greenville, Mississippi, within the jurisdiction of the said District Court.

B. Statement Of The Facts.

1. No responsive pleading or motion was served upon plaintiff by the defendants within 20 days after service of the summons and complaint upon the latter (218 F 2d 805).

2. Instead, the defendant bank 34 days, and King 36 days, after service of the summons and complaint upon them filed motions for security for costs (218 F 2d 805). No action was taken by the district court on these motions. The bank 44 days and King 48 days after service of the summons and complaint

upon them then each filed:

> "...a motion to dismiss on the grounds that, as shown by the attached decree rendered June 15, 1953, in the Chancery Court of Adams County, Miss., in cause No. 14632, J. W. King vs. Jack C. Vaughan, (a) that plaintiff was a citizen of Mississippi and the requisite diversity of citizenship was therefore lacking; and (b) the complaint failed to state a claim entitling plaintiff to relief filed July 18th by the bank and July 21st by King;" (218 F. 2nd 805).

The said Adams County, Miss., Chancery Decree, which was rendered 15 days after the commencement of this action in the federal court, recited that the state court obtained jurisdiction of the defendant therein (plaintiff in this cause) as follows:

> "...on the 25th day of April, 1953, Deputy Sheriff William Hebert duly and legally served the defendant, Jack C. Vaughan with process in the manner as set out in Section 1859 of the Mississippi Code of 1942 Annotation, Subsection (3), in the following words and figures to-wit:
>
> > 'I have this day executed the within writ on Jack C. Vaughan the within named defendant, by posting a true copy of the same on the door of defendant's usual place of abode in my county. The defendant could not be found in my county, nor could I find any member of said defendant's family over the age of sixteen willing to receive the same at Jack C. Vaughan's usual place of abode.'
> >
> > 'This the 25th day of April, 1953.'
> >
> > 'Audley B. Conner, Sheriff
> > By Wm. I. Hebert, D.S.'
> >
> > (TR. 33-34).
>
> "The Court, therefore, adjudges and decrees that the said defendant, Jack C. Vaughan, is an adult resident citizen of Natchez, Adams County, Mississippi, residing with his family at one of the old homes of said city known as 'Arlington', and that that is the said defendant's usual place of abode and that said process was in compliance with Section 1859 of the Mississippi Code of 1942, and that on this occasion the said defendant, Jack C. Vaughan, has been duly and legally served with process in the manner and for the time required by law, and that an appear-

ance by said defendant, Jack C. Vaughan, was due at this term of Court and that said defendant, Jack C. Vaughan, has wholly made default in the premises (TR.34)"....

"...IT IS NOW THEREUPON AND HEREBY ordered, adjudged and decreed that the said defendant, Jack C. Vaughan, is indebted to the complainant, J. W. King, in the amount of ...($6,250.00)..., that J. W. King do have and recover of and from Jack C. Vaughan the sum of $6,250.00 and judgment is hereby rendered in favor of the said J.W. King, complainant, and against the said Jack C. Vaughan, defendant, for said amount...ORDERED, ADJUDGED AND DECREED this 15th day of June, A. D., 1953.

s/ F. D. Hewitt
Chancellor

3. Plaintiff endeavored to have the District Court exclude the state court decree as matter outside the pleadings by filing a "Motion To Disregard Effect Of Unjust Decree(5)", but the motion to exclude was ignored by the District Court. Plaintiff did not learn of the existence of the Final Decree of the state court until July 20, 1953 (TR.38,46).

---

(5) Pertinent portions: "The plaintiff, Jack C. Vaughan, respectfully moves the Court to disregard as a complete nullity the Final Decree filed heretofore in this cause, which said Final Decree was rendered by the Chancery Court of Adams County,..Mississippi, on the 15th day of June..1953, in the cause entitled 'J. W. King vs. Jack C. Vaughan. C. #14,632', and all the proceedings taken and rights acquired thereunder, upon the grounds that: (1) the defendant therein, Jack C. Vaughan, was never properly served with process. (2) The defendant therein, Jack C. Vaughan, had no "usual place of abode" in Adams County, Mississippi, on the 25th day of April, 1953, upon the door of which any writ could be posted, he having: (a) On August 27, 1952, determined to become a citizen of Louisiana. (b) On September 27, 1952, removed his household and personal effects to Louisiana. (c) On December 31, 1952, abandoned his voting rights in Mississippi. (d) On January 9, 1953, publicly renounced his Mississippi citizenship by filing his "Declaration Of Domicile" in Louisiana. (e) On March 16th, 1953, had his federal income tax (1952) return filed in Louisiana. (f) Been gainfully, continuously and uninterruptedly employed in a manufacturing plant in Louisiana from October 7th, 1952, until well past the date of 25th of April, 1953....." (TR. 37-38)

4. Then treating the defendants' "motions to dismiss" as responsive answers to the complaint, motions for judgment on the pleadings, and motions for summary judgment; plaintiff filed a counter-motion for summary judgment in which he brought forth affidavits(6) of competent witnesses controvert-

---

(6) "...Deponent (plaintiff) avers that on the 25th day of April, 1953, he had no "usual place of abode" in Adams County, Mississippi, as recited in Sheriff Audley B. Conner's return, upon the door of which any writ could have been posted since he had long before removed to Louisiana, had become domiciled, and employed there, had gone to Louisiana with the intention of becoming a citizen and resident of Orleans Parish, therein, had removed his household and personal effects there, had abandoned his voting rights in Mississippi, had filed his tax return in Louisiana, and by means of a Declaration of Domicile filed in the Parish of Orleans, State of Louisiana, had in effect publicly renounced his Mississippi citizenship. In support hereof Plaintiff files herewith the following Exhibits:

"EXHIBIT "A": 'Declaration Of Domicile' recorded in the Mortgage Office for the Parish of Orleans, in Mortgage Office Book 1850 Folio 457: State of Louisiana, Parish of Orleans. BEFORE ME, the undersigned authority, personally came and appeared: JACK C. VAUGHAN who, after first being by me duly sworn, did depose and say: That he moved into this Parish and State on August 27, 1952; that at that time it was his intention to make this Parish and State his residence and domicile; that he continues in such an intention. That he makes and files this affidavit for the purpose of establishing his intention. Sig: Jack C. Vaughan. SWORN to and subscribed before me, this 9th day of January, 1953. Sig: Michael H. Bagot, Not.Pub. NEW ORLEANS,LA.,JAN.9,1953 11:15 AM. H. RICKERFOR.CLK (TR.58)".

"EXHIBIT "B": Certificate of Clifford R. Field:'State of Mississippi, County of Adams. I, the undersigned Clerk of the Circuit Court and County Registrar of Adams County, Mississippi, and the duly qualified custodian of the registration of voters of said County and State, hereby certify that Jack C. Vaughan registered for voting purposes in the Registration Book for the Court House Precinct of Adams County, Mississippi, on September 6th, 1946 and that he was qualified to vote during the years beginning 1946 through the year 1952 but that he is not now a qualified voter in said precinct of Adams County, Mississippi, nor any other precinct of Adams County, Mississippi. Given under my hand and seal of office this 11th day of April, 1953. Sig: Clifford R. Field, Clerk of the Circuit Court and County Registrar of Adams County, Mississippi, SEAL (R.59)"

ing the only issues raised by the motions for summary judgment of the defendants. Plaintiff then asserted that there were no

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"EXHIBIT "C": Affidavit Of Kenneth R. Glenn.....State of Louisiana, Parish of Orleans. Before me the undersigned authority in and for the State and Parish aforesaid came and appeared Kenneth R. Glenn...who having first been duly sworn, stated: (1) That he is the manager of the....property whose address is 4440 Chef Menteur Highway, located in the City of New Orleans, Parish of Orleans, and State of Louisiana. (2) That his records show that one Jack C. Vaughan, who listed a previous address at Natchez, Mississippi, moved to the said 4440 Chef Menteur Highway address on or about September 27, 1952 with household and personal effects. (3) That except for the period May 15th, 1953 to on or about June 6th, 1953, the said Jack C. Vaughan, as shown by Affiant's records, has lived continuously and uninterruptedly at the said 4440 Chef Menteur Highway, New Orleans, Louisiana to and including this 24th day of July, A. D. 1953. s/ Kenneth R. Glenn, Affiant. Sworn to,..etc..... this 24th day of July, A.D., 1953. s/ Gene Friedman, Notary Public. My Commission Expires at death. SEAL" (TR.60).

"EXHIBIT "D": Letter from U.S.Treasury Department, Office of the District Director of Internal Revenue, Customhouse, 423 Canal Street, New Orleans 16, Louisiana, signed and SEALED by Mr. George H. Heintzen. 'Mr. Jack C. Vaughan, 4440 Chef Menteur Highway, New Orleans, Louisiana. Dear Mr. Vaughan: In accordance with your request the records of this office were examined for the year 1952 and they disclose the receipt of your income tax return, showing the name and address as indicated above. The return was filed on Form 1040 and received in this office on March 16, 1953. It was assigned serial number OR 719213. Yours very truly, George A. Lambert, District Director, By: George H. Heintzen...Acting Assistant Chief, Returns Processing Branch (SEAL)". (TR.61).

"EXHIBIT "E": Affidavit of James J. Scanlon, vice-president of the U. S. Optical Corporation, 1618 Polymnia Street, New Orleans, La... State of Louisiana, Parish of Orleans. Before me the undersigned authority in and for the Parish and State aforesaid came and appeared James J. Scanlon who having first been duly sworn made oath that at all times during the period October 7th, 1952 to May 15th, 1953, inclusive, he was Vice-President of the U. S. Optical Corporation, 1618 Polymnia Street, New Orleans, Louisiana; and that of his own personal knowledge Jack C. Vaughan, Clock No. 83, was continuously and uninterruptedly employed by the said U. S. Optical Corporation under his direct supervision...during the said period....SWORN TO...etc., 23rd July, 1953...."(R.62).

"EXHIBIT "F": Affidavit of Joseph L. Dominick, Department Head of the U. S. Optical Corporation....that of his own personal knowledge Jack C. Vaughan, Department Head...was employed continuously and uninterruptedly (Oct. 7 1952 to May 15, 1953) in an office adjacent to that of affiant...SWORN..etc 7/23/53. (TR.63-64).

further issues left to be tried, and that he was entitled to summary judgment against the defendants as a matter of law. The following allegations of fact, as stated in the complaint and exhibits, thereto, were set forth by the plaintiff as being undisputed and undenied and, therefore, admitted by the defendants (R.45-46):

a. That on March 28, 1950, plaintiff became equitable owner in possession of some 3,720 acres of farm and pasture lands, known as "Florence" Plantation, in Chicot County, Arkansas (TR.2). That he paid some $15,000.00 in order to qualify for ownership (TR.2) in fee of either all or one half of the lands upon the payment of additional sums certain to one Fred P. Branson, of Muskogee, Oklahoma.(7)

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(7) The Vaughan-Branson contract recited: ..."If and when.. (Vaughan) shall pay as rent or otherwise $30,000.00 to (Branson, the then owner) or his representatives, (Vaughan) shall receive a conveyance of an undivided one-half of the said (lands)...but when said conveyance is made, the Grantee (Vaughan) shall assume one half of the Mortgage still due the Connecticut General Life Insurance Company, not exceeding $10,-000.00 and (Branson) shall make no further mortgage indebtedness or lien on said lands pending consummation of this agreement.(R.11)".

"...If, in event (Vaughan) elects, to exercise the option to purchase the said plantation in its entirety on or before December 1, 1950, then and in that event (Vaughan) shall have the right to purchase the entire farm and receive a warranty deed therefor by paying (Branson) the crop rent for 1950 and $28,000.00, and (Vaughan) assuming the remainder ($24,000.00) due the Connecticut General Life Insurance Company (TR.12)".

"It is agreed between (Branson) and (Vaughan) that this contract shall remain in effect for one year, if and in the event (Vaughan) exercises the option contained in the last paragraph hereinabove, but if he does not exercise the said option as of December 1, 1950, then this contract of lease (of all of the lands) and option to buy one half interest in the (lands) shall be for the years 1950, 1951 and 1952, expiring December 31, 1952 (R.12)".

b. That due to plaintiff's efforts in getting an all-weather road into the Plantation at great personal expense; the value of the lands was greatly increased (TR.23,41).

c. That upon the advice and urging of the President of the defendant bank, acting on behalf of the bank and within the scope of his authority, plaintiff was induced to agree to sell his interests in the Plantation, reserving certain oil mineral rights, for $75,000.00 ---- consisting of $51,000.00 cash, and the purchaser assuming the $24,000.00 First Mortgage (TR.3). The agreement to sell was addressed to the defendant King, written on the defendant bank's stationary, and attested to by the said bank president (TR.14-15).

d. That plaintiff arranged for all funds necessary to pay off Branson ($29,457.45) and obtain, therefor, a warranty deed to "Florence" Plantation. That plaintiff was compelled to rely upon commercial banking facilities and the knowledge peculiar only to supposedly experienced bankers to effectuate a legal and proper transfer of the funds to Branson in compliance with the terms of the Branson-Vaughan contract of March 28, 1950 (TR.3,4,12).

e. That the defendant bank became plaintiff's agent to complete the transaction (TR.4,20-21,41-42).

f. That the bank was to be paid a fee or commission of $6,250.00 (TR.4) to be divided with King, real estate agent

b. That due to plaintiff's efforts in getting an all-weather road into the Plantation at great personal expense, the value of the lands was greatly increased (TR.[illegible]).

c. That upon the advice and urging of the President of the defendant bank acting on behalf of the bank and within the scope of his authority, plaintiff was induced to agree to sell his interests in the Plantation, reserving certain oil mineral rights, for $75,000.00 --- consisting of $[illegible],000.00 cash, and the purchaser assuming the $[illegible],000.00 First Mortgage (TR.3). The agreement to sell was addressed to the defendant King, written on the defendant bank's stationery, and attested to by the said bank president (TR.[illegible]).

d. That plaintiff arranged for all funds necessary to pay off Branson ($[illegible],457.45) and obtain, therefor, a warranty deed to "Elevenee" Plantation. That plaintiff was compelled to rely upon commercial banking facilities and the knowledge peculiar only to supposedly experienced bankers to effectuate a legal and proper transfer of the funds to Branson in compliance with the terms of the Branson-Vaughan contract of March 26, 1950 (TR.3,4,12).

e. That the defendant bank became plaintiff's agent to complete the transaction (TR.4,20-21,41-42).

f. That the bank was to be paid a fee or commission of $6,850.00 (TR.4) to be divided with King, real estate agent

(Campbell v. Duncan, 84 F. Supp. 732 -TR.49) with a previous criminal record and conviction for fraud (TR.49), agent of the bank, and through the bank, now plaintiff's agent. Also upon the urging of the bank and King, plaintiff retained a Lake Village, Arkansas, lawyer --- one Carneal Warfield -- paying Warfield a requested $500.00 retainer. Unknown to plaintiff, but known to the bank and King, Warfield was either already, or subsequently became, the attorney of an adverse party, one C. A. Mewis, and antagonistic to the interests of the plaintiff (TR. 4,5,21-23,42).

g. That upon the advice of his agents, the bank and King, plaintiff was induced to place one, B. H. Kraemer, in possession of the Plantation with the understanding that all of the interests of the plaintiff would be protected (TR.5,24-25). That Kraemer turned out to be a partner of C. A. Mewis (R.5,42), and through Kraemer, Mewis fraudulently obtained possession of "Florence" Plantation (TR.42).

h. That in a suit for specific performance brought by plaintiff against Branson -- Vaughan vs. Branson, et al, No. 7894, in the Chicot County, Arkansas, Chancery Court; the said Chancery Court held, on August 22, 1951, that due to the negligent and unbusinesslike manner in which the defendant First National Bank of Greenville, Mississippi, had handled the $29,-457.45 entrusted to it for tender to Branson, the plaintiff, Vaughan, had failed to make a proper tender to Branson on or before December 1, 1950, and plaintiff was denied legal title

to the Plantation in its entirety. But the Chancery Court decree of Chicot County left all of Vaughan's other equitable interests in and to the Plantation intact. This included his right to possession of all of the lands for the years 1951 and 1952; and his equitable ownership of the one-half undivided interest in "Florence" Plantation, subject only to payment to Branson, or his representative, by rent or otherwise, of $30,-000.00 on or before December 31, 1952, and assumption of a mortgage not exceeding $10,000.00 (TR.12).

i. That unknown to the plaintiff, but known to the defendant bank and King, on December 18, 1950, the said C. A. Mewis had secretly and fraudulently leased to certain Keith Brothers all of the best farming lands of the plantation for the years 1951 and 1952 (TR.26). Plaintiff's attorney, the said Carneal Warfield, and plaintiff's agents, the First National Bank of Greenville, J. W. King, and B. H. Kraemer, now openly appeared in support of C. A. Mewis against their principal, the petitioner here (TR.23).

j. That by this secret action on the part of the bank, King, Warfield, Mewis and the Keith Brothers, the plaintiff was fraudulently deprived of use and occupancy of the Plantation for the years 1951 and 1952 (TR.7). That plaintiff's farming equipment, valued at $20,000.00, stood idle and was eventually seized by mortgagees (TR.7). That the Keith Brothers produced a cotton crop valued in excess of $50,000.00 during 1951, alone; and Mewis, besides producing $10,000.00

of corn, grazed more than one thousand (1,000) head of cattle on "Florence" Plantation at a profit of $30,000.00 in 1951, alone (TR.6,26).

k. That as for the plaintiff, Vaughan, he received not one cent of rental, nor one cent of the $75,000.00 so-called "offer" for his interest in "Florence" Plantation --- by which bait he was lured from possession of the Plantation in the first place (TR.6) by the defendant bank and King (TR.42-43).

l. That by reason of the foregoing wrongs of the defendants, the plaintiff sustained the following damages and losses, to-wit:

a.	Net cash loss	$ 21,542.55
b.	Loss of oil mineral rights	22,000.00
c.	1951-52 crop loss, less cost of growing & harvesting	60,000.00
d.	1951-52 net grazing losses	60,000.00
e.	Loss of machinery & equipment seized	20,000.00
	Total losses and damages	$183,542.55

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5. No opposition was made by the defendants, The First National Bank of Greenville, and J. W. King, to any of the above stated facts set forth in plaintiff's counter motion for summary judgment. No opposing affidavits were filed by the defendants, and no testimony offered in contradiction of any of the facts set forth in the plaintiff's supporting affidavits.

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6. On November 19, 1953, the District Court enter-an ORDER[8] holding the Adams County, Miss., Chancery Court decree of June 15, 1953, to be valid and res judicata as to all matters complained of against the defendant, J. W. King, in this cause, and dismissing the action as to King (TR.81).

7. Plaintiff was given no prior notice of the District Court's trial of November 19 (TR.164-166). The hearing was held during plaintiff's absence several hundred miles distant, and plaintiff was not notified of the entry of the ORDER until after business hours on December 3, 1953 (TR.84,166), despite his attempts to get the Clerk of the District Court to communicate with him as to what had transpired on Nov. 19.[9] (TR.83-84).

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(8) "...THIS CAUSE coming on this day to be heard on the motion of the defendant, J. W. King, for dismissal of the above styled and numbered cause of action as to the said J. W. King alone on the grounds that the complaint filed herein fails to state a cause of action as to the said J. W. King on which relief can be granted and the Court, having previously found on consideration of a motion to dismiss this action for lack of the necessary diversity of citizenship as between the parties hereto, that the decree of the Chancery Court of Adams County, Mississippi in Cause No. 14,632, styled 'J. W. King vs Jack C. Vaughan', rendered by the Honorable F. D. Hewitt, Chancellor, on the 15th day of June, 1953, was a just and valid decree, is of the opinion that all disputes between these parties, the said J. W. King and Jack C. Vaughan, arising out of the transaction complained of in the cause now before this Court either have or should have been settled before the Chancery Court of Adams County, Mississippi in its proceedings and that the said decree of the said Chancery Court of Adams County, Mississippi is Res Judicata as to all matters complained of as against the defendant, J. W. King, in this cause.

"It is, therefore, Ordered, Adjudged and Decreed that this action should be, and it is hereby dismissed as to the defendant, J. W. King.

"ORDERED, ADJUDGED AND DECREED this the 19th day of November, A.D., 1953.

s/ ALLEN COX
District Judge " (TR.81)

(9) Pertinent portions of AFFIDAVIT OF PLAINTIFF, ETC."..Jack

8. On December 8, 1953, plaintiff filed the following "Election To Stand Upon The Pleadings" which stated in part:

"...Deponent (plaintiff) verily believes that, from his standpoint, further proceedings on his part in this Honorable Court would be useless. Deponent verily believes that there are no further issues left to be tried. Deponent verily believes that since this Court has sustained the Chancery Decree of June 15, 1953, holding Plaintiff to be a Mississippi citizen, but which decree is believed to be void by Deponent; Deponent does not believe this Honorable Court can now entertain jurisdiction of the defendant The First National Bank of Greenville, whose Motion To Dismiss of July 18th, 1953, was based upon the same (allegedly void, according to Plaintiff) Chancery Decree -- Cause No. 14,632, styled 'J. W. King vs Jack C. Vaughan', Chancery Court of Adams County, Mississippi, rendered June 15th, 1953...(R.84-85)".

"ELECTION TO STAND UPON THE PLEADINGS. In view of the foregoing, the plaintiff respectfully elects to stand upon the pleadings heretofore filed in this cause, and suffer judgment of dismissal as to the defendant First National Bank of Greenville, Mississippi, in order to present for review by the Appellate Courts the proceedings taken in this cause."

"WHEREFORE, plaintiff respectfully moves the Honorable Court to direct the Clerk to enter an Order dismissing this cause of action as to the remaining defendant, The First National Bank of Greenville, Mississippi.(R.85-86)"

C. Vaughan, plaintiff, being first duly sworn, on oath states: 1. That he is the plaintiff in the above styled and numbered cause. 2. That on November 23, 1953, he mailed a typewritten letter to "Hon. Hubert D. Stephens, Jr., Clerk ------ District Court of the United States - Northern District of Mississippi-- Oxford, Mississippi", requesting advice as to whether Judge Cox had made any disposition of any of the several motions which were before him at the opening of the present Term; and requested certified copies of any Orders made, together with a certified copy of the Docket entries".

"That on December 2nd, 1953, Deponent deposited with Western Union the following telegram: HON. HUBERT D. STEPHENS, JR., CLERK, UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF MISSISSIPPI, OXFORD, MISSISSIPPI HAVE NOT RECEIVED REPLY TO MY LETTER MAILED YOU NOVEMBER TWENTY THIRD REQUESTING YOU ADVISE WHETHER JUDGE COX HAS MADE DISPOSITION OF ANY OF THE SEVERAL

The motion for dismissal was ignored by the District Court.

9. On December 16, 1953, plaintiff filed notice of Appeal (TR.87) from the Order of November 19th, 1953.

10. On March 6th, 1954, the District Court enter-an ORDER(10) dismissing the action as to the remaining defendant, The First National Bank of Greenville, Mississippi, for failure of plaintiff to provide security for costs (TR.92-93, 218 F. 2nd 805). On March 31st, 1954, the plaintiff filed Notice of Appeal (R.93) from the Order of March 6th.

MOTIONS WHICH WERE BEFORE HIM AT THE OPENING OF THE PRESENT TERM IN CASE NUMBER 120, GREENVILLE, DIVISION, VAUGHAN VS. FIRST NATIONAL BANK OF GREENVILLE, ET AL. I ALSO REQUESTED CERTIFIED COPY OF THE DOCKET ENTRIES. PLEASE OBLIGE. JACK C. VAUGHAN, BOX 434, MAIN POST OFFICE, ST. LOUIS 3, MISSOURI".

"...That after business hours on December 3rd, 1953, Deponent (plaintiff) received through the mails purportedly certified copies of the Order of November 19th, 1953, dismissing the action as to the Defendant, J. W. King...That this was the first notice that (plaintiff) had that such Orders had been made...(TR.83-84)".

(10) "ORDER. This cause having come on to be heard upon the motion of THE FIRST NATIONAL BANK OF GREENVILLE to dismiss the complaint herein of JACK C. VAUGHAN for his failure to give security for costs pursuant to order entered in this cause under date of November 24, 1953, and it appearing that more than sixty days have elapsed from the date of the said prior order requiring costs and that Jack C. Vaughan, plaintiff, has failed to give security for costs in the manner provided by law or to show good cause why he should not be required to furnish such security, and it further appearing to the Court from the pleadings on file that Jack C. Vaughan, plaintiff, does not propose to comply with the order of the court regarding security for costs and that the motion of The First National Bank of Greenville is well taken and should be sustained: IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the complaint of Jack C. Vaughan be and the same is hereby dismissed as to The First National Bank of Greenville, one of the defendants in said action for failure to provide security for costs. ORDERED, ADJUDGED and DECREED, this 6th day of March, 1954."

The motion for dismissal was ignored by the District Court.

9. On December 16, 1953, plaintiff filed notice of Appeal (TR.87) from the Order of November 19th, 1953.

10. On March 6th, 1954, the District Court entered an ORDER[10] dismissing the action as to the remaining defendant, The First National Bank of Greenville, Mississippi, for failure of plaintiff to provide security for costs (TR.92-93, [illegible]). On March 31st, 1954, the plaintiff filed notice of Appeal (R.93) from the Order of March 6th.

MOTIONS WHICH WERE BEFORE HIM AT THE OPENING OF THE PRESENT TERM IN CASE NUMBER 120, GREENVILLE, DIVISION, VAUGHAN VS. FIRST NATIONAL BANK OF GREENVILLE, ET AL., AND REQUESTED PERTAINING COPY OF THE DOCKET ENTRIES, PLEASE ADVISE.

JACK C. VAUGHAN, BOX 484, MAIN POST OFFICE, ST. LOUIS 3, MISSOURI.

"...That after business hours on December 2nd, 1953, Defendant (plaintiff) received through the mails purportedly certified copies of the Order of November 19th, 1953, dismissing the action as to the Defendant, P. W. King...That this was the first motion that (plaintiff) had that such Orders had been made...(TR.92-93)".

(10) "ORDER. This cause having come on to be heard upon the motion of THE FIRST NATIONAL BANK OF GREENVILLE to dismiss the complaint herein of JACK C. VAUGHAN for his failure to give security for costs pursuant to order entered in this cause under date of November 24, 1953, and it appearing that more than sixty days have elapsed from the date of the said prior order requiring costs and that Jack C. Vaughan, plaintiff, has failed to give security for costs in the manner provided by law or to show good cause why he should not be required to furnish such security, and by further appearing to the Court from the pleadings on file that Jack C. Vaughan, plaintiff, does not propose to comply with the order of the Court regarding security for costs and that the motion of The First National Bank of Greenville is well taken and should be sustained. It is, THEREFORE, ORDERED, ADJUDGED and DECREED that the complaint of Jack C. Vaughan to and the same is hereby dismissed as to The First National Bank of Greenville, one of the defendants in said motion for failure to provide security for costs. ORDERED, ADJUDGED and DECREED, this 6th day of March, 1954."

11. The Court of Appeals was asked to reverse the Orders of the District Court of November 19th, 1953, and March 6th, 1954, for the following reasons:

"(1) The District Court erred in dismissing the action as to the defendant J. W. King on grounds that the complaint fails to state a cause of action (R.100,161)".

"(2) The District Court erred in holding that the decree of the Chancery Court of Adams County, Mississippi, in the cause No. 14,632, styled 'J.W.King v Jack C. Vaughan', rendered on June 15th, 1953, was a just and valid decree. Said decree was void and a nullity as the said Chancery Court lacked jurisdiction (R.100)".

"(3) The District Court should have awarded summary judgment for plaintiff Vaughan against the defendants the First National Bank of Greenville, Mississippi, and J.W. King.

"(4) Upon plaintiff's motion to dismiss as to the remaining defendant, the District Court, under Rule 41(a)(2) of the Federal Rules of Civil Procedure, should have then dismissed upon terms and conditions it deemed proper insofar as plaintiff's motion for dismissal was concerned. The District Court erred in ignoring plaintiff's motion; erred in waiting almost three months for another cause for dismissal under Rule 41-(b) to ripen; and erred in dismissing for the latter cause upon the remaining defendant's motion to dismiss (R.100)."

12. On January 28, 1955, the United States Court of Appeals for the Fifth Circuit sustained the District Court on points (1), (3) and (4); but overruled the District Court on point (2) by stating :

"Here complaining of the November 19th Order to the extent that the Order was based upon the finding that the Adams County decree 'is res judicata as to all matters complained of as against King', that the hearing was had and the judgment entered without notice to him, without adequate pleading and proof to support it, and without any basis in law or in fact, appellant insists that the judgment of dismissal was erroneous and may not stand..."

"We agree with appellant that the record affords no basis for the conclusion of the district judge that the Adams County decree is res judicata of all matters alleged in plaintiff's suit, and that it should be dismissed on that

"(1) The District Court erred in dismissing the action as to the defendant E. V. Craig on grounds that the complaint fails to state a cause of action [illegible].

"(2) The District Court erred in holding that the courts of the Chancery Court of Adams County, Mississippi, in the [illegible] rendered on June 30th, 1958, [illegible] valid decree [illegible] Court [illegible] jurisdiction [illegible].

"(3) The District Court erred in [illegible] Judgment [illegible] Plaintiff Vaughn [illegible] Defendants [illegible] Patent [illegible] Chancery Practice [illegible].

"(4) Upon plaintiff's motion to dismiss as to the defendant, the Federal Rules of Civil Procedure [illegible] the Federal Rules of Civil Procedure have been [illegible] Court [illegible] Rule 41(a)(2) [illegible] [illegible] the District Court erred in ignoring plaintiff's motion [illegible] Rule 41-(b) to [illegible] dismissing for the latter cause [illegible] on the remaining defendant's motion to dismiss (R.100).

[illegible] on January 5th, 1960, the United States Court [illegible] Mississippi, Jackson Division, dismissed the District Court [illegible] on point [illegible] but remanded the District Court [illegible] Rule 41(a)(2) [illegible] [illegible] [illegible]

ground...".

"...the order of the district judge dismissing plaintiff's action as to King is affirmed, though not for the reason that the Adams County judgment is res judicata". (TR.177-178, 218 F. 2nd 805).

13. On February 14, 1955, the appellant, Vaughan, filed Petition For Rehearing.(11) The petition for rehearing was denied by the Court of Appeals on March 17 (TR.186).

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(11) "PETITION FOR REHEARING...Comes now the appellant, Jack C. Vaughan, and presents this, his petition for rehearing of the above entitled cause; and respectfully calls the attention of the Court to the following matters of law and fact believed inadvertently overlooked by the Court as shown by its Opinion of January 28, 1955".

" I. The '...motion for security for costs...filed July 8th by the bank and July 9th by King...' were, appellant believes, absolutely prohibited by Federal Statute. The motions were filed prior to their responsive pleadings, which were overdue. Motions for security for costs are not listed among the only types of motions permitted by Rule 12(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A. to be filed prior to a pleading. Therefore, any orders of dismissal based upon such "motions" are, appellant believes, complete nullities as a matter of Federal Law".

" II. By the '...motion to dismiss on the grounds that, as shown by the attached decree rendered June 15, 1953, in the Chancery Court of Adams County, Miss., in cause No. 14632, 'J. W. King vs. Jack C. Vaughan'...', matters outside the pleading (were) presented to and not excluded by the Court. This was despite plaintiff's '...motion filed by plaintiff July 27, 1953, to disregard the effect of the unjust decree relied on by defendants...'. Therefore, under Rule 12(b) of the Federal Rules of Civil Procedure, 28 USCA, the motions to dismiss were actually motions for summary judgment, and should have been disposed of as provided by Rule 56 of the Federal Rules of Civil Procedure, 28 USCA. This the District Court refused to do in regard to the bank; although it upheld King who had filed absolutely identical pleadings".

" III. The '...motion for summary judgment on the complaint and affidavit of the plaintiff with exhibits attached.....', being unopposed by defendants, should have either been granted plaintiff; or else the District Court was required, under Rule 56 of the Federal Rules of Civil Procedure "...to make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of dam-

14. On April 26th, 1955, it was ORDERED by Mr. Justice HUGO L. BLACK, Associate Justice of the Supreme Court of the United States, that the time for filing petition for writ of certiorari in this cause be extended to and including 25th June, 1955.

* * * * *

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ages or other relief is not in controversy..' (Emphasis added). Appellant respectfully submits that if the District Court had complied with Rule 56, from the pleadings, affidavits and depositions on file, it would have been forced to specify that ALL of the facts alleged by plaintiff were without controversy. Therefore, plaintiff was, and, appellant respectfully submits, still is entitled to summary judgment against defendants as a matter of Federal Law.

" IV. Defendant King's motion to dismiss the complaint having been sustained, and the complaint dismissed as to him (TR.81), plaintiff properly announced his election to stand upon the pleadings, moving the Court for a final order or judgment dismissing the action as to the remaining defendant bank, in order to appeal (TR.85-86). (Dye v. Farm Mortgage Investment Co. (10TH CCA) 70 F. 2d 514; Crutcher v. Joyce (10TH CCA) 134 F. 2nd 809; Asher v. Ruppa (7TH CCA) 173 F. 2d 10). The District Court erred in ignoring plaintiff's motion to dismiss as to the defendant bank; erred in waiting almost three months for another cause for dismissal (failure to provide security for costs) to ripen; and erred in dismissing for the latter cause upon the defendant bank's motion (R.92). (Cone v. West Virginia Paper Company, 330 U.S. at p. 217; 67 S.Ct. 752; 91 L.Ed. 849).

"Wherefore, upon the foregoing grounds, it is respectfully urged by appellant that this petition for rehearing be granted; that the Orders of the District Court appealed from be reversed; and that summary judgment in the amount of $133,542.-55, together with interest and costs, be awarded appellant Jack C. Vaughan against the appellees First National Bank of Greenville, Mississippi and J. W. King.

Respectfully submitted,
Jack C. Vaughan
Appellant,...etc.

VI.

ARGUMENT.

A. If A State Court Decree Is Void For Want Of Jurisdiction; Then Should Not An Order Of The District Court, based Upon It Being Res Judicata, And The JUDGMENT Of The Court Of Appeals, Sustaining The Order Of The District Court, Also Be Considered Legal Nullities?

From the unopposed and undisputed affidavits and depositions of competent witnesses in a position to testify to the facts; it is clear that the petitioner, Jack C. Vaughan, had no "usual place of abode" in Adams County, Mississippi, on April 25, 1953, upon the door of which any summons could have been appended with legal effect; for his Louisiana residence and citizenship had been established for many months prior to April 25, 1953. By January 9, 1953, when Vaughan publicly renounced his former Mississippi citizenship by the filing of his Declaration of Domicile in Louisiana; he had complied with all legal prerequisites essential to Louisiana citizenship as prescribed by that State's laws:

> "A change of domicile from another State of the Union to this State is brought about by the act of residing here, combined with the intention of making one's home here, of renouncing citizenship elsewhere".
> Umbarger vs. Tower (La.), 131 So. at page 510.

This Court has repeatedly stated the principle that State court judgments or decrees rendered without personal jurisdiction having first been obtained on the defendant or someone authorized to accept service of the notice in his behalf, or by waiver of service of process by general appearance or otherwise, are void. Goldey v. Morning News, 156 U.S.518;521; 15 S. Ct.

VI.

ABSTRACT

A. If a State Court Decree be Void For Want Of Jurisdiction, Then Should Not An Order Of The District Court, Issued Upon It Being Has Relevant And The ABSTRACT OF The Court Of Appeals; Sustaining The Order Of The District Court Also Be Considered Equal Nullities?

From the unchanged and unlimited affidavits and depositions of competent witnesses in a position to testify to the facts, it is clear that the petitioner Jack G. Vaughan, had no "usual place of abode" in Adams County, Mississippi, on April 28, 1953, upon the date of which any summons could have been appended with legal effect; for his Louisiana residence and citizenship had been established for many months prior to April 28, 1953. By January 9, 1953, when Vaughan publicly renounced his former Mississippi citizenship by the filing of his Declaration of Domicile in Louisiana, he had complied with all legal prerequisites essential to Louisiana citizenship as prescribed by that State's laws:

> "A change of domicile from another State of the Union to this State is brought about by the act of residing here, combined with the intention of making one's home here, of renouncing citizenship elsewhere".
> Dobbins vs. Tower (Ind.), 131 So. at page 510.

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559; 39 L.Ed. 517. Cooper v. Newell, 173 U.S. 555; 19 S.Ct. 506; 43 L.Ed. 808. Therefore, the Final Decree of the Chancery Court of Adams County, Mississippi, rendered on June 15, 1953, in the cause styled: "J. W. King vs. Jack C. Vaughan, No. 14632, is void for want of jurisdiction of the defendant, therein (petitioner, here).

And since the living breath of validity may not be instilled into a null and dead judgment by some other court; it must follow that the ORDER of the District Court of November 19, 1953, dismissing the action as to the defendant, J. W. King, based upon the null Adams County decree ---- as well as the JUDGMENT of the United States Court of Appeals for the Fifth Circuit of January 28, 1955, sustaining the ORDER ---- must also be considered absolutely void. Validity could not be given to either of the Federal Courts' ORDERS or JUDGMENTS without validity also being given to the void state court decree.

B. Since Plaintiff, By Virtue Of The Failure Of The Clerk To Comply With Rule 77(d), Was Now Prohibited By Rule 59(b) Of The Federal Rules Of Civil Procedure, 28 USCA, From Moving The District Court For A New Trial; Did He Not --- In Accordance With The Decisions Of The Courts Of Appeals For The Seventh And Tenth Circuits--- Properly Announce His Election To Stand Upon The Pleadings And Record, And Move The District Court For A Final Order Or Judgment Of Dismissal In Order To Appeal?

C. Upon Plaintiff's Motion For Dismissal As To The Remaining Defendant On December 8, 1953; Should Not The District Court Have Dismissed Upon Such Terms And Conditions As The Court Deemed Proper, Instead Of Waiting Until March

6, 1954, For Grounds Of Failure To Obey A Court Order Requiring Security For Costs To Ripen; Then Dismissing On The Latter Grounds Upon Motion Of The Remaining Defendant?

Rule 59(b) of the Federal Rules of Civil Procedure states that a motion for a new trial "SHALL" be served not later than 10 days after the entry of the judgment, and Rule 6(b) states that the Court may not extend the time for taking any action under Rule 59(b).

As shown by the Record, as the result of the refusal of the District Court Clerk to even communicate with the plaintiff (TR.83-84) - in violation of Rule 77(d); plaintiff did not receive notice of the Order of November 19, 1953, until after business hours on December 3rd, 1953 ---- fourteen (14) days after "entry of the judgment"! Passing the question, at this time, of the astounding refusal of the Clerk to comply with the mandatory "shall" language of command employed by Rule 77(d), United States v. Thoman, 156 U.S. 353, 360; 15 S. Ct. 378; 39 L.Ed. 450. Anderson v. Yungkau, et al, 329 U.S. 482, 485; 67 S.Ct. 428; 91 L.Ed. 436; the fact remains that the only place left for the plaintiff to turn for relief was to the Appellate Courts, if he hoped to set aside the order of the District Court which had breathed life into the void Adams County Chancery Court decree by holding it to be res judicata. It would have been useless for the plaintiff to continue to pursue his suit against the remaining defendant in the district court ----- for what was res judicata as to King was, in effect, also res judicata as to the bank. They were

both charged with an identical fraud, and an inseparable fraud. They both lured the plaintiff out of possession of "Florence" Plantation with a fictitious and fraudulent $75,000.00 "offer". And both were to share equally in the $6,250.00 cross-claim of King vs. Vaughan (TR.4,35). Anyhow, by sustaining the state court decree which held plaintiff to be a citizen of Mississippi; the District Court had automatically divested itself of jurisdiction as to the remaining parties. It could not retain jurisdiction and at the same time hold that both the plaintiff and the remaining defendant were Mississippi citizens.

It is believed clear that the plaintiff was forced to break off the contest with the remaining defendant in the District Court in order to have the validity of the state court decision decided by the appellate courts of last resort. This he is permitted to do, under Rule 41(a)(2) upon such terms and conditions as the Court deemed just. Cone v. West Virginia Paper Company, 330 U.S. at page 217; 67 S.Ct. 752; 91 L.Ed. 849. According to the United States Court of Appeals for the Seventh and Tenth Circuits, plaintiff's announced election to stand upon the record and suffer a final judgment or order of dismissal in order to appeal was proper. Dye vs Farm Mortgage Investment Co. (10TH CCA) 70 F. 2d 514. Crutcher vs Joyce (10TH CCA) 134 F. 2d 809. Asher v. Ruppa (7TH CCA), 173 F. 2nd 10. Petitioner submits that the District Court erred in refusing to enter the order of dismissal requested by the plaintiff; erred in waiting almost three months for another cause for dismissal (failure to obey a court order requiring security for costs) to ripen; and

erred in dismissing on the latter grounds, on March 6th, 1954, upon the motion of the defendant. And the Court of Appeals erred in sustaining the District Court which denied plaintiff his right to proceed according to the decisions of this Court, and the Courts of Appeals for the Seventh and Tenth Circuits.

D. Does A Federal District Court Have The Power To Permit A Motion To Be Filed Prior To A Responsive Pleading, Other Than One Of The Seven (7) Types Of Motions Permitted By Rule 12(b) Of The Federal Rules Of Civil Procedure, 28 USCA?

Petitioner respectfully submits that there is no basis in federal law for the entry of such an ORDER as that of the District Court of March 6, 1954. In the first place, Rule 12(a) "commands" (shall) that a responsive pleading "shall" be served on plaintiff within 20 days from service of summons and complaint upon the defendant -- unless one of the following jurisdictional motions are made:

(1) Lack of jurisdiction over the subject matter;
(2) Lack of jurisdiction over the person;
(3) Improper venue;
(4) Insufficiency of process;
(5) Insufficiency of service of process;
(6) Failure to state a claim upon which relief can be granted;
(7) Failure to join an indispensable party.

It is to be noted that there is no provision for such motions as "for security for costs" listed among the ONLY types of motions permitted under Federal Law to be filed PRIOR to an answer. This is not to say that Federal District Courts may not impose the condition upon litigants that costs must first be secured before the case may proceed further. No one would

seriously contend that such a condition could not be imposed by a district court under the provisions of Rule 83 of the Federal Rules Of Civil Procedure. But Rule 83 cannot take precedence over Rule 12(a); for Rule 83 states that the district courts may only "regulate their practice in any manner not inconsistent with these Rules". Permitting a motion for security for costs, or any one of the hundreds of other possible motions that human ingenuity might conceive, to be filed prior to a responsive pleading would be so inconsistent with Rule 12(a)(b) as to nullify the effect of the Rule entirely.

Since there is no provision, then, under the Federal Rules of Civil Procedure, which would permit such a motion to be filed; and since the Federal Rules of Civil Procedure "govern the procedure in the United States District Courts in all suits of a civil nature" (Rule 1, F.R.C.P.; Korno-Smith Co. vs. School District of City of Scranton, 44 F.Supp. 711); then not only was the motion for security for costs itself invalid, but the ORDER of November 24, 1953 (requiring security for costs) based upon it; and ORDER of dismissal (for failure to provide security for costs) of March 6, 1954 -- and the JUDGMENT of the Court of Appeals of January 28, 1955, sustaining the ORDER of the District Court -- were also invalid.

E. Should Not Whether A So-Called "Motion To Dismiss" is a "motion" or "pleading" be determined not by the designation given it by the defendants, but by the contents of the instrument itself?

F. Since a cross-claim is a responsive pleading, and since res judicata is an affirmative defense, and under Rule 8(c) of the Federal Rules of Civil Pro-

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F. Since a cross-claim is a responsive pleading, and since res judicata is an affirmative defense, and under Rule 8(c) of the Federal Rules of Civil Pro-

cedure "shall" be asserted in a responsive pleading; should not so-called "motions to dismiss" of defendants, which set forth affirmatively a cross-claim for $6,250.00, and res judicata as a complete defense to the entire action and a bar on the merits be treated as responsive pleadings rather than motions to dismiss -- and, therefore, motions for judgment on the pleadings under Rules 12(c) and 56 of the Federal Rules of Civil Procedure?

G. Plaintiff's motion for summary judgment on the complaint, responsive pleadings, depositions and admissions, together with affidavits and exhibits, being unopposed and uncontroverted by defendants; is not the district court required, by Rule 56(c)(d) of the Federal Rules of Civil Procedure to:

1. Either grant the motion; or
2. Make an Order specifying that all of the allegations of the complaint were admitted by the defendants?

H. Where there are no issues remaining to be tried; if the complaint states a claim entitling plaintiff to some relief; should not the district court forthwith enter an order granting plaintiff summary judgment under Rule 56(c) of the Federal Rules of Civil Procedure?

Turning the the main question of this suit - that of whether or not the petitioner is entitled to summary judgment as a matter of law -- there are no questions of fact remaining to be tried.

Both of the defendants elected to stake their case upon their "motions to dismiss", which were predicated upon the Adams County, Mississippi, Chancery Court decree (King v. Vaughan) being res judicata as to petitioner's Mississippi, rather than alleged Louisiana, citizenship; and res judicata as to Vaughan's claims against King (which would also absolve the bank, since both defendants were charged with the same acts of fraud).

"The question arises, is the pleading filed by the defendants a motion to dismiss or is it an answer? This is not to be determined by the designation given it by the defendants, but by the contents of the pleadings. The name given to a pleading does not change the pleading. And although the defendants have designated the pleading a motion to dismiss, it is, we think, in fact an answer and (should) be treated as such".

Baker v. Sisk, 1 F.R.D., 232,236.

The Adams County, Mississippi, Chancery Court's final decree of June 15th, 1953, was a complete defense to the entire action, if it were such a decree as to cause the District Court to state that it "is Res Judicata as to all matters complained of as against the defendant, J. W. King, in this cause (R.81)".

Here was no ordinary "motion to dismiss". Here was actually a cross-claim for $6,250.00 ------ the same amount which plaintiff had agreed to pay to the bank (TR.4) as a joint fee or commission "to be divided with the defendant, J. W. King, real estate agent, and agent of plaintiff..." and to which they would have been entitled had they committed no frauds.

Defendants did not have to deny any of the allegations of the complaint, themselves. All they had to do was let the Chancellor of Adams County, Mississippi, Chancery Court be their Advocate; and let him dispose of the entire case ---- not on a motion simply denying jurisdiction ---- but on the merits with a Final Decree of his own, rendered fifteen (15) days after the institution of this action, which would give judgment to the defendants for the $6,250.00 "fee or commission" in spite of their frauds.

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Baker v. Fisk, 1 Y.R.R., [illegible].

The Adams County, Mississippi, Chancery Court's final decree of June 16th, 1953, was a complete defense to the entire action, if it were even a decree as to cause the District Court to state that it "is Res Judicata as to all matters complained of as against the defendant, J. T. King, in this cause (f.81)".

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Under Rule 7(a) of the Federal Rules of Civil Procedure, a cross-claim is a pleading. And res judicata is an affirmative defense which "shall" be asserted in a pleading (not in a motion) -- Rule 8(c), F.R.C.P.; Jones v Miller, 2 FRD 479; Stoddard v Morrin, 8 FRD 375; Eberle v Sinclair Prairie Oil Co., 35 F. Supp. 296.

The so-called "motions to dismiss" of the defendants were actually motions for judgment on the pleadings under Rule 12 (c); and, therefore, motions for summary judgment under Rule 56.

No opposition was made by the defendants either to the plaintiff's motion to dismiss the cross-claim (Motion To Disregard Effect Of Unjust Decree - TR.37-38) on grounds of lack of jurisdiction of the state court over the person of the defendant, and insufficiency of service of process (Rule 12(b)(2)(5), F.R.C.P., 28 USCA) in the state court case --- or the affidavits in support thereof in plaintiff's counter-motion for summary judgment!

Rule 8(d) states that averments in a complaint (pleading) are admitted when not denied in the answer (responsive pleading). And since the defendants' so-called "motions to dismiss" were actually answers --- unless the Adams County decree were res judicata; every single allegation of the complaint HAD to be taken as admitted by the defendants, as a matter of federal law!

Under Rule 7(a) of the Federal Rules of Civil Procedure, a cross-claim is a pleading. And res judicata is an affirmative defense which "shall" be asserted in a pleading (not in a motion) -- Rule 8(c), F.R.C.P.; Jones v Miller, 2 FRD 479; Stoddard v Morrin, 6 FRD 375; Eberle v Sinclair Prairie Oil Co., 35 F. Supp. 296.

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Rule 8(d) states that averments in a complaint (pleading) are admitted when not denied in the answer (responsive pleading). And since the defendants' so-called "motions to dismiss" were actually answers --- unless the Adams County decree were res judicata; every single allegation of the complaint HAD to be taken as admitted by the defendants as a matter of federal law!

The United States Court of Appeals for the Fifth Circuit, on January 28, 1955, completely destroyed this last refuge of the defendants when it held:

> "We agree with appellant (petitioner, here) that the record affords no basis for the conclusion of the district judge that the Adams County decree is res judicata...".
>
> "The order of the district judge dismissing the plaintiff's action as to King is affirmed, though not for the reason that the Adams County judgment is res judicata".
> 218 F. 2nd 805(R.177-178).

Since there were now no issues remaining to be tried; if the complaint stated a claim, the plaintiff was entitled to relief prayed as a matter of federal law.

A reading of the allegations of the complaint and exhibits leaves no doubt but that through the malfeazance and fraud of the defendants, his agents, the plaintiff was baited from possession of "Florence" Plantation by means of the fictitious $75,000.00 offer for part of his interests in the lands. That he acted upon the "offer" by following the instructions of his agents in turning the lands over to Kraemer, who, known to the bank and King, delivered the lands to Mewis, who "slammed the gate" against the plaintiff. It is too clear that through this deceit and abuse of trust by the defendant bank and King, the plaintiff's large-scale farming operation of almost 4000 acres was destroyed. On an operation of such magnitude, the prayer for recovery of the stated losses and damages cannot be considered excessive

This petition should probably end here. But there is another reason why plaintiff should have been granted summary judgment as a matter of law.

Where a plaintiff's motion for summary judgment under Rule 56 is unopposed, as in this case; there are no further issues remaining to be tried. The question then is: Was it the intention of this Court and Congress, in establishing Rule 56, to permit the discretion of a district court to govern the granting or the not granting of the motion?

This Supreme Court of the United States has held that the use, by Congress, of the word "shall" in a Rule or Statute, being in the language of command, makes the doing or the not doing of the act mandatory; not permissive. Anderson v. Yungkau et al, supra.

Rule 56 (c)(d) states that upon the motion for summary judgment being served:

> "The judgment sought SHALL (emphasis added) be rendered forthwith, if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law..."
> "If on motion under this rule judgment is not rendered...for...the relief asked...the court shall..... make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy...The facts so specified shall be deemed established...".

And this Supreme Court in Griffin v. Griffin, 327 U.S. 220, 225, stated:

"By Rule 56(d) of the Rules of Civil Procedure, the (District) Court, on a motion for summary judgment, is required....to make an order specifying the facts that appear without substantial controversy, and...the facts so specified shall be deemed established...".

From the foregoing, petitioner believes that the District Court, in this case, was required to either grant the plaintiff's motion for summary judgment; or make an order specifying that all of the allegations of the complaint were admitted by the defendants. In which case the plaintiff would be entitled to the relief prayed, since a claim is stated.

The Court of Appeals erred in sustaining the District Court in its failure to comply with the mandatory provisions of Rules 12(b)(c) and 56 of the Federal Rules of Civil Procedure.

C O N C L U S I O N

For the foregoing reasons, petitioner, Jack C. Vaughan, respectfully prays the Honorable Court to grant this petition for a writ of certiorari to be directed to the United States Court of Appeals for the Fifth Circuit, and upon the merits:

1. To find and state the above facts specially;

2. To reverse the JUDGMENT of the United States Court of Appeals for the Fifth Circuit entered in this cause on January 28, 1955;

3. To reverse the orders of the United States District Court for the Northern District of Mississippi, entered in this cause on November 19, 1953, and March 6, 1954.

4. To order the entry of summary judgment for the petit-

tioner and against the respondents in the amount of $183,542.55, together with interest and costs, and for which order that execution issue;

5. To grant such other relief as is by this Court deemed appropriate.

Respectfully submitted,

s/ JACK C. VAUGHAN

Jack C. Vaughan, petitioner, in propria persona.
MAILING ADDRESS:
Post Office Box 1005,
Gardena, California

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

Before me the undersigned authority in and for the State and County aforesaid, came and appeared Jack C. Vaughan, who having first been duly sworn did state on oath that he is the petitioner in the above-styled cause, and that he did serve a true copy of the above and foregoing petition for writ of certiorari upon the respondents by mailing same, postage prepaid, via Air Mail, First Class Mail, to counsel of record of said respondents, in envelopes duly addressed to them at their last stated addresses, to-wit: Mr. W. C. Keady, 119 North Broadway, Greenville, Mississippi (counsel for the respondent The First National Bank of Greenville, Mississippi); and Mr. R. V. Kimble, Jr., Post Office Box 335, Greenville, Mississippi, (counsel for the respondent J. W. King). That same were duly deposited in the United States Mails in the United States Post Office at Gardena, California, by the undersigned petitioner on the 9th day of June, A. D., 1955.

s/ JACK C. VAUGHAN

Jack C. Vaughan

SWORN TO AND SUBSCRIBED before me this 9th day of June A. D., 1955.

s/ R. J. Albright
Notary Public

My Commission Expires:
11-26-1956

(S E A L)